
ARTICLE

SUPREME STALEMATES: CHALICES, JACK-O'-LANTERNS, AND OTHER STATE HIGH COURT TIEBREAKERS

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High courts + high stakes = high drama. But not always. As the Supreme Court's 2015 Term showed, some bombshell cases fizzle rather than dazzle. During the fourteen months it took for Justice Antonin Scalia's successor to arrive at One First Street, some of the Term's most controversial—and consequential—cases divided 4–4. And when the highest court in the land deadlocks, it issues a dry, nine-word order: “The judgment is affirmed by an equally divided Court.” Supreme stalemate.

*That anticlimactic result isn't inevitable. Indeed, thirty-three states reject SCOTUS's “ties happen” approach, using various substitute-justice mechanisms to avert or break legal logjams when their high court is shorthanded. The anti-stalemate states differ in four important ways: (1) when fill-in appointments are made; (2) who can be appointed; (3) who does the appointing; and (4) how much discretion the appointer has. In Louisiana, for example, the court clerk randomly plucks a potentially tiebreaking justice's name, pre-deadlock, from a plastic Halloween Jack-o'-Lantern. In Texas, the Governor handpicks the temporary justice, post-deadlock, knowing exactly which case has stymied the high court. Imagine the President of the United States deciding *Bush v. Gore* by deciding who will decide it!*

This Article, based on original survey research, canvasses impasse resolution in all fifty states' high courts and evaluates the good, bad, and in-between of the sundry approaches. How do unsatisfying SCOTUS stalemates compare with what happens in state courts of last resort? High-court snarl-ups are a vexing issue, and the state-by-state details vary widely—and wildly. But this much is clear: Some state mechanisms to avoid stalemate are plainly more juris-imprudent than others.

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INTRODUCTION

I was in Atlanta for a symposium on Supreme Court transparency when the shocking news arrived in a terse Twitter direct message: “Scalia dead.” For a generation of legal conservatives, the February 2016 death of Justice Antonin Scalia was a devastating philosophical loss. A towering intellectual figure, Justice Scalia was the undisputed godfather of the Court’s conservative invigoration. His passing portended a seismic, once-in-a-generation altering of the High Court’s ideological balance.

The impact was not just philosophical, but practical. Justice Scalia’s seat remained empty for 422 days, the longest-ever opening on the nine-member Court. The Nation’s capital was consumed with fractious DEFCON-1 rancor, amplified by the impending presidential election, and Justice Scalia’s successor had to await President Obama’s successor.¹

¹ Soon after Justice Scalia’s passing, two constitutional scholars examined the Court’s various eight-justice rosters since World War II and concluded that the Court, while “in a tough spot,” had weathered such vacancies before and “managed its docket without a hitch.” Josh Blackman & Ilya Shapiro, *Only Eight Justices? So What*, WALL ST. J. (Feb. 24, 2016, 7:01 PM), <https://www.wsj.com/articles/only-eight-justices-so-what-1456272088> [<https://perma.cc/9LT3-CKR7>] (noting also that only twenty-five of fifty-four reargued cases ended up 5–4). The Court, they said, would not “grind to a halt” but “can easily handle the current vacancy, however long it lasts.” *Id.* The most likely result, they predicted: delayed rulings in a handful of cases. *Id.* Supreme Court justices from both the left and right appeared to agree. Two uniquely qualified authorities, Justices Breyer and Alito, similarly remarked that the Court would not be unduly hamstrung in its work. “We’ll miss him, but we’ll do our work,” said Justice Breyer. Jon Schuppe, *Supreme Court’s Breyer Says Scalia’s Death*

Political stalemate in turn yielded judicial stalemate. Because SCOTUS has no tiebreaking mechanism, divisive cases either lock up 4–4 (thus affirming the lower court), linger until a new justice arrives, or resolve in ways that duck the more nettlesome issues. Here, a single indefinite vacancy left the Court evenly divided in several cases, producing 4–4 nondecisions that resolved nothing.²

Fast forward to 2020, when the passing of another legal giant, Justice Ruth Bader Ginsburg, sparked an even fiercer confirmation fracas. For the second presidential election in a row, the Court instantly became a major campaign issue. This time, the stakes were even higher (the prospect of a 6–3 conservative supermajority), and the election even nearer (just forty-six days away). Leading Democrats openly spoke of “packing” the Supreme Court (expanding its size for the first time since 1869) if they captured the White House and Senate.³

But put aside Court packing—adding seats in hopes of influencing the Court’s decisions. What about Court *hacking*? Not addition but infiltration. What if a politician could singlehandedly engineer the outcome of a case? Specifically, what if the President could name a fill-in justice to cast a tiebreaking vote in a single case? Imagine if President Obama (while the “Scalia seat” sat unfilled) or President Trump (had the “Ginsburg seat” remained unfilled) had possessed the extraordinary power to appoint a

Won't Impact Most Votes, NBC (Feb. 25, 2016, 4:13 PM), <http://www.nbcnews.com/news/us-news/supreme-court-s-breyer-says-scalia-s-death-won-t-n525856> [<https://perma.cc/HUA2-ZHQ5>]. “We will deal with it,” replied Justice Alito when asked about Senate Republicans’ determination not to advance any nominee during the 2016 election year. *Alito: Supreme Court Will Find a Way to Do Its Work with 8 Justices*, CBS (Feb. 26, 2016, 4:26 PM), <http://www.cbsnews.com/news/alito-supreme-court-will-find-a-way-to-do-its-work-with-8-justices> [<https://perma.cc/55LX-AWLX>]; but see Katie Reilly, *Ruth Bader Ginsburg Suggests Senate Should Confirm Merrick Garland in Lane-Duck Session*, TIME (Oct. 12, 2016, 4:22 PM), <https://time.com/4527889/ruth-bader-ginsburg-merrick-garland-confirmation> [<https://perma.cc/U8AM-BV8M>] (“Eight is not a good number for a collegial body that sometimes disagrees.”).

² Even before Justice Scalia’s passing, the Court was at risk of deadlock over a recurring controversy: the constitutionality of racial preferences in college admissions. See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (considering an eight-year-old case making its second trip to the High Court). Justice Kagan recused herself, likely given her work on the case while serving as Solicitor General. Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Justice Kagan’s Recusals*, SCOTUSBLOG (Oct. 9, 2012, 9:50 PM), <https://www.scotusblog.com/2012/10/scotus-for-law-students-sponsored-by-bloomberg-law-justice-kagans-recusals> [<https://perma.cc/PS6W-H7AZ>] (suggesting reasons for Justice Kagan’s recusal). A Kagan-less Court might have split 4–4 over race-based admissions, but after Justice Scalia died, the Court proceeded with seven justices and divided 4–3 in favor of racial preferences. *Fisher*, 136 S. Ct. 2198.

³ See Emily Jacobs, *Top Democrats threaten to pack Supreme Court if Trump Fills RBG Seat*, NY POST (Sept. 21, 2020, 8:13 AM), <https://nypost.com/2020/09/21/top-democrats-threaten-to-pack-supreme-court-if-trump-fills-seat> [<https://perma.cc/CH7G-BZX5>] (reporting on Democratic support for court packing) (quoting, among others, Senate Minority Leader Chuck Schumer, House Judiciary Chairman Jerrold Nadler, and former U.S. Attorney General Eric Holder).

substitute justice to break 4–4 deadlocks.⁴ How would that strike our finicky Framers, who preferred to divide power rather than concentrate it? Such singular clout seems unthinkable. One might hope, however naively, that a President would nobly refuse to game the system by naming a “sure thing” temporary justice. But could any flesh-and-blood politician, if given such an extraordinary prerogative, withstand the lure of putting a finger (or an anvil) on the scale, deciding the case by deciding who will decide the case?

Consider this Mother of All Hypotheticals: *Bush v. Gore*, with President Clinton (a Democrat) selecting a tiebreaking justice to decide whether George W. Bush (the Republican candidate) or Al Gore (his own vice president) will succeed him. Or recall Spring 2012 when the Court was first weighing the constitutional fate of President Obama’s signature domestic achievement, the Affordable Care Act.⁵ Assume that Justice Elena Kagan, who was Solicitor General when the ACA was debated and passed and whose office was involved in litigation strategy, had recused herself.⁶ Presumably, the High Court would’ve deadlocked 4–4. Under a President-picks tiebreaker system, President Obama would’ve had the astonishing power to choose who decided whether the cornerstone of his presidential legacy lived or died.

These hypotheticals may seem outlandish or otherworldly. But that’s precisely the system used in my home state of Texas. What sounds hysterical for SCOTUS is historical for SCOTX. When the Supreme Court of Texas locks up 4–4, the Governor alone chooses a temporary, one-case-only tiebreaking justice.⁷ More remarkable, the Governor knows not just that *a* case is tied, but *which* case is tied. As a constitutional matter, the Governorship of Texas is relatively weak.⁸ But this perk is unparalleled. No other Governor in America boasts such unilateral power—carte blanche license to, essentially, decide an identifiable supreme court case by handpicking the tiebreaking vote.⁹

⁴ Justice Ginsburg’s successor, Justice Barrett, was swiftly confirmed. But the temporarily shorthanded Court did split 4–4 in an important election case, thus affirming a ruling from the Pennsylvania Supreme Court that had extended the deadline for counting some mailed ballots. See Adam Liptak, *Supreme Court Tie Gives Pennsylvania More Time to Tally Some Votes* (Nov. 4, 2020), <https://www.nytimes.com/2020/10/19/us/supreme-court-pennsylvania-voting.html> [<https://perma.cc/XVC4-4UNS>].

⁵ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

⁶ See Wermiel, *supra* note 2.

⁷ See *infra* Subsection II.B.2.b.

⁸ See, e.g., Paul Burka, *The Terminator*, TEXAS MONTHLY (Dec. 2009), <https://www.texasmonthly.com/politics/the-terminator> [<https://perma.cc/29V6-AUFG>] (“[T]he state constitution of 1876 . . . established the governorship as a weak office with few powers . . .”); accord Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1339 (1990) (recounting that the constitutional convention “fragmented the executive branch by providing for a weak governor”).

⁹ See *infra* Section II.B; Appendix A. Texas boasts innumerable sources of Lone Star pride:

Intrepidity at the Alamo; entering the United States as the Republic of Texas; fifty-eight Texas-born recipients of the Medal of Honor; Bob Wills and George Strait;

In Washington, D.C., things operate differently. The United States Supreme Court is famously tiebreaker-free. As the Court put it a century and a half ago: “No affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made.”¹⁰ While federal district and circuit courts freely enlist fill-in judges as needed, no analog exists for filling a temporary SCOTUS vacancy. In fact, federal law flatly forbids it.¹¹ When the High Court deadlocks 4–4 (or 3–3, as happened in 1792, when the Court first split down the middle),¹² the lower-court judgment is automatically, procedurally, perfunctorily affirmed. With nine bland words, the case is nulled, exactly as if the Court had never granted certiorari in the first place: “The judgment is affirmed by an equally divided Court.”¹³ In other words, “a tie goes to the Respondent.”¹⁴

A 4–4 nondecision, though hailed by the party that won below, carries the aura of failure. Failure to decide. Failure to guide. Failure to “get the conflict resolved,” as Justice John Paul Stevens put it.¹⁵ When certiorari is granted at SCOTUS, it means the issue was deemed significant by at least four justices who wanted to settle it. Briefs were submitted. Oral argument was held. Another cert petition that might have been granted was denied to make room for this one. True, the issue may recur, and the Court may not be shorthanded when it does. But for the foreseeable future, a 4–4 draw maroons the undecided issue on an island of legal confusion, where it lingers, unsettled, squandering untold public and private resources, lost in “the repeating loop of intercircuit conflicts.”¹⁶

Nolan Ryan and Babe Didrikson Zaharias; five Super Bowl titles (sadly, none this millennium); Dr Pepper and the “little creamery” in Brenham; deep-fried anything at the State Fair; a spirit of daring and rugged independence . . .

In re Reece, 341 S.W.3d 360, 378 (Tex. 2011) (Willett, J., dissenting). But the Lone Star State’s anomalous approach to breaking high court ties does not make the list.

¹⁰ *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1868).

¹¹ 28 U.S.C. § 294(d) (authorizing retired federal judges to assist in various federal courts but stating “[n]o such designation or assignment shall be made to the Supreme Court”). Subsection (d) does not explicitly bar retired SCOTUS Justices from sitting by designation on their former Court, but the implied prohibition is widely accepted.

¹² *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792); see also Thomas E. Baker, *Why We Call the Supreme Court “Supreme”—A Case Study on the Importance of Settling the National Law*, 4 GREEN BAG 2D 129, 130 (2001) (citing *Hayburn’s Case* as the first equally divided Court).

¹³ See, e.g., *Costco Wholesale Corp. v. Omega*, 562 U.S. 40, 41 (2010) (per curiam) (“Justice Kagan took no part in the consideration or decision of this case.”), *aff’g by an equally divided court* 541 F.3d 982 (9th Cir. 2008).

¹⁴ Baker, *supra* note 12, at 130.

¹⁵ Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 91 n.39 (2011).

¹⁶ Baker, *supra* note 12, at 131.

Sure, if shorthandedness results not from a recusal but from a vacancy, the Court can simply order reargument once it regains full strength.¹⁷ Reargument is common. But if deadlock stems from a recusal, the lower-court decision persists, yielding finality (of a sort) to the parties but not to the People, for whom legal clarity must await another day, and possibly quite a far-off day.

The rule of affirmance by an equally divided Court is entirely judge-made. Nothing in positive law—constitutional, statutory, or otherwise—requires it, although Congress has tacitly accepted it.¹⁸ Unlike the cert-granting Rule of Four, which “has become interwoven in the warp and woof of the jurisdictional statutes,”¹⁹ the rule of implicit affirmance is an internal housekeeping tradition. But it is a longstanding one, first appearing in 1792, when the Court divided 3–3 on a motion,²⁰ and formally adopted in 1825.²¹

By contrast, state high courts are less hidebound, and, frankly, more consequential. SCOTUS may be the highest court in the land (at least on federal-law matters).²² “For most Americans,” however, “Lady Justice lives in the halls of state courts.”²³ “Day by day, American justice is dispensed—overwhelmingly—in state, not federal, judiciaries.”²⁴ As Justice Scalia once observed, state law (and thus state courts) matter far more to citizens’ everyday lives: “If you ask which court is of the greatest importance to an American citizen, it is not my court.”²⁵ And when it comes to avoiding high court stalemate, most states reject SCOTUS’s “nonprecedent” precedent.

This Article examines an ignored area of judicial administration: impasse-avoidance mechanisms in state courts of last resort. Using original survey data covering every state in the nation, plus interviews with key judicial and

¹⁷ This is what happened, for example, following Justice Robert Jackson’s sudden death in 1954 and Justice Lewis Powell’s retirement in 1987. See Blackman & Shapiro, *supra* note 1 (noting also that only twenty-five of fifty-four reargued cases ended up 5–4).

¹⁸ See Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 646, 651–52 (2002) (analyzing 28 U.S.C. § 2109, which suggests Congress “presupposed the existence of the rule of affirmance by an equally divided Court”).

¹⁹ Baker, *supra* note 12, at 130.

²⁰ Hayburn’s Case, 2 U.S. (2 Dall.) 408 (1792); see also Baker, *supra* note 12, at 130.

²¹ The Antelope, 23 U.S. (10 Wheat.) 66, 67 (1825) (“Where the Court is equally divided, the decree of the Court below is of course affirmed, so far as the point of division goes.”). As Chief Justice Marshall explained the following Term in *Etting v. Bank of the United States*, “the principles of law which have been argued cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it.” 24 U.S. (11 Wheat.) 59, 78 (1826).

²² See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

²³ John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES (Nov. 26, 2011), <https://www.nytimes.com/2011/11/27/us/budget-cuts-for-state-courts-risk-rights-critics-say.html> [<https://perma.cc/7F3G-4KW6>] (quoting former Colorado Supreme Court Justice Rebecca Love Kourlis).

²⁴ Thompson v. Dall. City Att’y’s Off., 913 F.3d 464, 471 (5th Cir. 2019).

²⁵ See Justice Scalia Honors U.S. Constitution, GW TODAY (Sept. 18, 2013), <https://gwtoday.gwu.edu/justice-scalia-honors-us-constitution> [<https://perma.cc/RXU4-77T2>].

gubernatorial officials, the Article takes an approach generally more descriptive than normative.

In short, states respond to tie-vote situations in eclectic ways.²⁶ Seventeen states emulate SCOTUS. If the high court splits evenly, the lower-court judgment stands.²⁷ But thirty-five courts reject SCOTUS's "ties happen" approach. These anti-stalemate states all use a temporary fill-in justice, though the state-by-state details vary in four fundamental ways:

1. *When a temporary justice is appointed, pre- or post-deadlock*: Twenty-four states name a substitute justice as soon as the court dips below full strength, while eleven courts wait until a tie emerges before naming someone.

2. *Who is eligible for appointment*: In thirty-two state high courts, the replacement justice must be a jurist; in three courts, others are also eligible.

3. *Who does the appointing*: In twenty-three courts, the Chief Justice names the substitute justice; in seven, the court does so; and in four, the Governor steps in.

4. *How much discretion the appointer has*: Some methods are rote and mechanical. For example, in fun-loving Louisiana, the clerk draws a name from a plastic Halloween Jack-o'-Lantern.²⁸ In more urbane Washington State, they use an elegant chalice.²⁹ In other states, the appointer has unfettered discretion, sometimes provoking cries of abuse.

This Article proceeds in four parts:

- Part I discusses the myriad costs inflicted by unbroken ties in courts of last resort (and at least some costs of breaking ties).

- Part II comprehensively examines how America's various high courts—not just SCOTUS—resolve, or refuse to resolve, evenly divided votes. In particular, it examines why SCOTUS has never had any tiebreaking mechanisms, and then looks in some detail at how different states tackle supreme court deadlock.

- Part III evaluates the vices of divergent tiebreaking systems used in state courts of last resort.

- Part IV, drawing on these broad experiences, proposes a more sensible approach for breaking high-court impasse, focusing on my home state of Texas, which has perhaps the most disquieting method of all.

Through this comprehensive analysis, I hope to spark fruitful reconsideration—perhaps even recalibration—in state capitals across America.

²⁶ See *infra* subsection II.A.2; Appendix A.

²⁷ Some of these states actually have a substitute-justice mechanism but never invoke it to break ties, e.g., New Jersey. See *infra* notes 414-423 and accompanying text.

²⁸ See *infra* Section II.B.

²⁹ See *id.*

I. THE TROUBLE WITH DEADLOCK

In law as in life, ties can be deeply unsatisfying. Rabid football fans would self-immolate outside National Football League headquarters on Park Avenue if the Super Bowl ended in a soulless tie. Indeed, the icon after whom the Lombardi Trophy is named reportedly said, “Winning isn’t everything; it’s the only thing.”³⁰ Participation trophies are ubiquitous in youth sports, but grown-up championships distinguish victor and victim. Game seven of the World Series would never end in a dismal 4–4 tie.³¹ But America’s other national pastime—suing people—can end that way. It’s the legal equivalent of the infamous cut-to-black ending of *The Sopranos*, when irate HBO subscribers thought their cable had been whacked; no bang or whimper, just . . . nothingness.

What is the *raison d’être* for courts? Krispy Kreme exists to make decadent, melt-in-your-mouth donuts. Lamborghini exists to make audacious, 0-to-60-in-under-3-seconds supercars. But what about the inscrutable judiciary, steeped in pomp and majesty with velvet curtains, black robes, mysterious Latin phrases? What’s its bottom-line business, specifically courts of last resort? There’s no consensus answer:

“To decide cases.”

—Justice Byron White, U.S. Supreme Court³²

“Courts exist to do justice, to guarantee liberty, to enhance social order, to resolve disputes, to maintain rule of law, to provide for equal protection, and to ensure due process of law. They exist so the equality of individuals and the government is reality rather than empty rhetoric.”

—National Association for Court Management³³

I side with no-nonsense Justice White. Courts, including high courts, are in the case-deciding business. They render decisions. And decisions rendered

³⁰ Beau Dure, *Winning Isn’t Everything: It’s the Only Thing. Right?*, GUARDIAN (Sept. 24, 2015, 5:00 AM), <https://www.theguardian.com/sport/2015/sep/24/winning-everything-sports> [https://perma.cc/AWD7-R7Y7].

³¹ At least not since 1885, when the second baseball world championship ended in a 3-3-1 tie, forcing St. Louis and Chicago to split the \$1000 prize. Victor Mather, *Not Again: Chicago and St. Louis Met in 1885 and 1886 Playoff*, N.Y. TIMES (Oct. 9, 2015), <https://www.nytimes.com/2015/10/10/sports/baseball/not-again-chicago-and-st-louis-met-in-1885-and-1886-playoff.html> [https://perma.cc/5D6V-X3LL].

³² Charles Lane and Bart Barnes, *Longtime Justice Byron White Dies*, THE WASHINGTON POST (Apr. 16, 2002), <https://www.washingtonpost.com/archive/politics/2002/04/16/longtime-justice-byron-white-dies/a5c2335a-81d8-4eb4-8696-1cc061a8b9fo> [https://perma.cc/8HUV-SU23].

³³ *Purposes and Responsibilities of Courts: Why Courts Exist*, Nat’l Ass’n for Ct. Mgmt., <https://nacmcore.org/competency/purposes-and-responsibilities> [https://perma.cc/8XTX-43J7].

by courts of last resort have precedential effect across their entire jurisdiction, which (one hopes) advances the noble virtues and institutional goals that NACM identifies above.

The decisions themselves do the bread-and-butter work of providing guidance, resolving uncertainties, and clarifying what the law prescribes and proscribes. On the federal level, the Framers of Article III commendably aimed for uniformity when they created “one supreme Court.”³⁴ Courts of last resort, both state and federal, have an irreplaceable function: to settle the law.³⁵ But no court can do that except by issuing decisions that declare both result and rationale.³⁶

Stalemate, while infrequent,³⁷ subverts the fundamental—and institutional—purpose of a supreme court: to be supreme and to speak supremely. Just as tech lovers once camped outside the Apple store because they craved the newest iGadget, law lovers frantically click “refresh” on SCOTUSblog because they too want a product: the latest U.S. Supreme Court declaration of what the law is. The decision is the prize because it provides what matters—who won, who lost, and why. The ruling rules.

A 4–4 tie produces a winner but no precedent; it resolves the case but not the issue. All that time, money, and energy—by the litigants and by the Court itself—with nothing to show for it. Such wheel spinning impairs the Court’s indispensable role in resolving lower-court conflicts and ensuring national uniformity.

³⁴ U.S. CONST. art. III, § 1; *see also* THE FEDERALIST NO. 22 (Alexander Hamilton) (“To produce uniformity in [judicial] determinations; they ought to be submitted in the last resort to one supreme tribunal.”); THE FEDERALIST NO. 78 (Alexander Hamilton) (examining the judiciary in the proposed constitution).

³⁵ Baker, *supra* note 12, at 129 (describing Justice Brandeis’s appreciation of the Supreme Court’s unique responsibility to settle law). As Justice Brandeis famously put it, “It is usually more important that a rule of law be settled, than that it be settled right.” *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting). He once told Justice Frankfurter, “In ordinary cases . . . you want certainty and definiteness and it doesn’t matter terribly how you decide so long as it is settled.” PHILIPPA STRUM, LOUIS D. BRANDEIS—JUSTICE FOR THE PEOPLE 366 (1984).

³⁶ Some states have slightly modified this doctrine by authorizing—under carefully controlled circumstances—what is anathema (indeed, an epithet) to all federal and most state courts: advisory opinions. *See, e.g.*, RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 58 (7th ed. 2015) (describing how some state courts may render advisory opinions when, for example, formally requested by the state legislature). But such a situation only highlights my larger point—a tie in an advisory opinion is especially worthless, akin to a doctor telling you that you are at death’s door or perfectly healthy, without deciding between those options.

³⁷ *See* Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 92 (2005) (finding an average of approximately 0.65 4–4 splits per Term from 1986 to 2003); *see also* McElroy & Dorf, *supra* note 15, at 94 (2011) (“In recent years, the Court has, on average, decided fewer than one case per term by a 4–4 vote as a result of a recusal.”). Indeed, the Court is not often seriously shorthanded. Between 1946 and 2003, “at least eight Justices participated in almost 97 percent of the Court’s cases.” *Id.* at 98 n.72.

Indeed, the mere prospect of deadlock—or more accurately, the absence of a needed fifth vote—alters litigant behavior. As the head of a D.C.-based association of corporate lawyers put it, “to assess risk, the business community likes to expect stability.”³⁸ In the wake of Justice Scalia’s sudden death, some fretted openly about a divided, Scalia-less Court. For example, Dow Chemical swiftly reassessed its risk in a then-pending class-action case and opted to cut its losses, settling the case because it was unsettled about the Court. Said the corporate spokeswoman: “With this changing landscape, the unknowns, we just decided to put this behind us.”³⁹ Courts exist to provide certainty, and the specter of stalemate haunts those craving predictability. Call it adjudication recalibration. Risk-averse businesses doubtless believed a Scalia-less Court was less likely to restrict class-action suits.⁴⁰ And since a Supreme Court loss ripples from sea to shining sea, they thought it better to stand down than risk defeat.

High-court impasse lands with a soul-crushing thud. The Kentucky Supreme Court put it plainly: “This Court’s responsibility is to decide all cases presented to it in an orderly and just fashion; a case affirmed by an equally divided court without opinion is not a quality decision by any stretch of the imagination and would limit this Court’s responsibility.”⁴¹ This policy has since been rescinded, however.⁴² It is no surprise that tie votes produce “some unhappy parties,” as the clerk of the Iowa Supreme Court understatedly put it.⁴³ The North Carolina Supreme Court clerk agrees: “Parties and litigants are not happy”⁴⁴—or, at least, the parties who sought the court’s now-denied review are not happy. One New Jersey group

³⁸ Joshua Jamerson & Brent Kendall, *Scalia’s Vacancy Could Leave Companies at a Loss*, WALL ST. J. (Feb. 26, 2016, 8:45 PM), <https://www.wsj.com/articles/dow-chemical-settles-lawsuit-citing-supreme-court-position-after-scalias-death-1456491317> [<https://perma.cc/M56G-6TCR>].

³⁹ *Id.*

⁴⁰ Cf. Jonathan H. Adler, *What Happened When Merrick Garland Wrote for Himself*, WASH. POST: VOLOKH CONSPIRACY (March 21, 2016, 11:07 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/21/what-happened-when-merrick-garland-wrote-for-himself> [<https://perma.cc/D2KP-HKET>] (describing some differences between the late Justice Scalia and President Obama’s nominee to replace him); see also, e.g., Aaron L. Nielson, *D.C. Circuit Review—Reviewed: Brooding Spirits, C.J. Garland Edition*, YALE J. REG.: NOTICE & COMMENT (March 16, 2016), <https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-brooding-spirits-c-j-garland-edition-by-aaron-nielson> [<https://perma.cc/XCS4-LK7Q>] (collecting opinions in which Chief Judge Garland wrote separately).

⁴¹ Ky. Utils. Co. v. S.E. Coal Co., 836 S.W.2d 407, 410 app. (Ky. 1992).

⁴² See *infra* note 154

⁴³ Telephone and E-mail Correspondence with Donna Humpal, Clerk, Iowa Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

⁴⁴ Telephone and E-mail Correspondence with Christie Roeder, Clerk, N.C. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

editorialized that tie votes “are not good for either litigants or the Court as an institution.”⁴⁵

Even so, it bears noting that some are untroubled by deadlock—or, at the very least, less troubled by deadlock than by the mechanisms for resolving deadlock. For example, some may fret that breaking a high-court tie using a non-high-court judge heightens the risk of error and of destabilizing precedent. Although averting impasse yields instant resolution, that benefit may pale in comparison to the potential costs of an erroneous resolution of the case or an erosion of *stare decisis*. On top of that, is it really that distressing for litigants to remain stuck with the able, reasoned judgment of the lower court?

As a former state supreme court justice, I dislike judicial deadlock. Many contemporary legal scholars focus on optimal court structure, assessing how divergent design characteristics further a court’s goals: impartiality, independence, efficiency, clarity, accuracy, and consistency.⁴⁶ But whether these lofty goals are underscored, or undermined, turns entirely on a court’s ability to fulfill its fundamental role: to decide cases. For example, some scholars favor enlarging the U.S. Supreme Court and letting it sit in panels.⁴⁷ Why? So the Court can decide more cases, which in turn will further normative goals like clarity and consistency⁴⁸ or reduce the power of a “swing” justice and perceived politicization.⁴⁹ Scholars may dispute which goals courts should advance, but it is indisputable that courts can only do so through their decisions. And because deadlocks dam decisions, it is no wonder that a supermajority of states have adopted a hodgepodge of procedures to stave off stalemate.

⁴⁵ Editorial, *Three’s Not a Charm*, 201 N.J.L.J. 394 (Aug. 2, 2010).

⁴⁶ See, e.g., Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 43 AM. J. COMPAR. L. 173, 175 n.7, 193-95 (2013) (analyzing the impact of court structure on access, cohesiveness of doctrine, inter-judge relations, and outside perception of the court); Benjamin R.D. Alarie, Andrew J. Green & Edward M. Iacobucci, *Is Bigger Always Better? On Optimal Panel Size, with Evidence from the Supreme Court of Canada* (Univ. Toronto Legal Stud. Rsch. Paper No. 08-15, 2011) (examining the structure of a variety of international high courts and proposing a model for determining optimal court panel size); F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645 (2009) (discussing the interaction between size and performance of the Supreme Court, and suggesting reconsideration of the Court’s size to better achieve institutional goals); Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439 (2009) (proposing several changes to the Supreme Court, including an increase in the size of the Court’s membership).

⁴⁷ See George & Guthrie, *supra* note 46, at 1457 (suggesting that Congress should authorize fifteen Supreme Court Justices to allow for panels of three); see also Jonathan Turley, *Unpacking the Court: The Case for Expansion of the United States Supreme Court in the Twenty-First Century*, 33(3) PERSP. ON POL. SCI. 155, 155 (2004) (arguing for an expansion of the Supreme Court to nineteen justices but not the use of panels).

⁴⁸ George & Guthrie, *supra* note 46, at 1442 (arguing that panel hearings would allow the Supreme Court to hear more cases without compromising outcomes).

⁴⁹ Turley, *supra* note 47, at 157 (arguing that the prevalence of 5–4 Supreme Court decisions suggests that more power is concentrated in one or two “swing justices”).

Every state high court is odd. That is, while state courts of last resort have different numbers of justices—five (18), seven (28), nine (6)⁵⁰—all 50 states have an odd number of justices, with one self-evident upside: avoiding deadlock.⁵¹

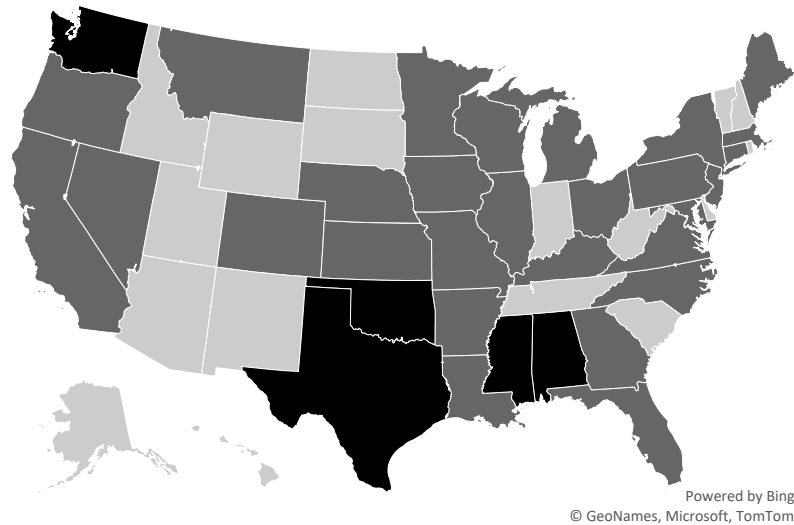


Figure 1: Number of Justices on State High Courts

Black: 9 justices, 6 states; **Dark gray:** 7 justices, 28 states; **Light gray:** 5 justices, 18 states
(Oklahoma’s civil high court has nine justices and the criminal high court has five)

Judicial vacancies do not slam shut the courthouse doors; the work of the court continues. But in discrete cases, vacancies can hobble a court. As a justice of the five-member Indiana Supreme Court aptly noted in response to a recusal motion, “the moving parties can do the appellate math and know that in the event of my recusal, they would only have to convince two judges to prevail, leaving the Court split and winning the tie.”⁵²

⁵⁰ See *infra* Appendix A. The total is 52 because, in Texas’s and Oklahoma’s dual systems, each state has two high courts. *Id.* In these two states with bifurcated high courts, the only court that doesn’t have nine justices is Oklahoma’s five-member Court of Criminal Appeals. *Id.*

⁵¹ The U.S. Supreme Court began as a six-member Court and endured several changes to its size until finally settling at nine in 1869. See Robinson, *supra* note 46 (discussing the early years of the Supreme Court and the fluctuating number of justices). While an odd-numbered body seems obviously preferable, many common law courts—the King’s Bench, the Court of Common Pleas, and the Court of the Exchequer—operated for centuries with four judges each. See John V. Orth, *How Many Judges Does It Take to Make a Supreme Court?*, 19 CONST. COMMENT. 681, 686 (2002).

⁵² *Ind. Gas Co. v. Ind. Fin. Auth.*, 992 N.E.2d 678, 682 (Ind. 2013) (Massa, J., denying motion for disqualification). The peril is most acute, however, not when a court faces equal division resulting from a single vacancy, but incapacitation resulting from multiple vacancies. For example, New York’s highest court began its 2015 session only seventy-two percent full. The seven-member court had two vacancies, “a deficit that could potentially affect dozens of cases on the court’s docket.” Colby Hamilton, *Court of Appeals Begins 2015 Two Judges Down*, POLITICO (Dec. 30, 2014, 5:55 AM);

II. STAVING OFF STALEMATE: IMPASSE RESOLUTION IN COURTS OF LAST RESORT

The nation's highest court has no mechanism to break 4–4 ties. This “ties happen” approach isn't intrinsic to courts of last resort. SCOTUS's approach is largely the product of history.⁵³ And in our compand republic, states aren't bound to follow SCOTUS's lead when it comes to deadlock. Indeed, most do not. Unsurprisingly, in our laboratories of democracy, entrepreneurial states have adopted innovations galore—ranging from mimicking SCOTUS (and doing nothing)⁵⁴ all the way to ceding nearly absolute control to the Governor, as in Texas.⁵⁵

A. *Ties That Bind: SCOTUS and Seventeen Like-Minded States*

1. SCOTUS is Statutorily and Structurally Tied to Ties

The U.S. Supreme Court is a by-the-book, rule-laden institution. For example, it takes four votes to grant a case⁵⁶ and ordinarily five to decide a case—but it takes a quorum of six justices to hear a case.⁵⁷ Congress set the six-justice quorum under its broad constitutional authority to enact “all Laws which shall be necessary and proper for carrying into Execution” the judicial power.⁵⁸ A majority of whatever number of justices sits is all that is required for a decision. So, a 4–2 decision is the tightest majority vote possible because

<https://www.politico.com/states/new-york/city-hall/story/2014/12/court-of-appeals-begins-2015-two-judges-down-000000> [<https://perma.cc/3Z68-RSZU>] (describing the process and challenges of filling the vacant seats on the New York Court of Appeals). The court needs all five judges to have a quorum. *Id.* Upshot: Any court decision would require four of the five to agree. *Id.* If they split 3–2, the court would have to reargue and re-conference the case after new judges come aboard. *Id.*

⁵³ See *supra* notes 18–21 and accompanying text.

⁵⁴ *Id.*

⁵⁵ See *supra* notes 7–9 and accompanying text.

⁵⁶ See Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981–82 (1957) (quoting *Reorganization of the Federal Judiciary: Hearings Before the S. Comm. On the Judiciary*, 75th Cong. 490 (1937) (statement of Sen. Burton K. Wheeler, reading letter from Chief Just. Hughes)) (outlining the Supreme Court's rule that, as Chief Justice Hughes put it, “the petition is always granted if four so vote”).

⁵⁷ 28 U.S.C. § 1 (“The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.”).

⁵⁸ U.S. CONST. art. I, § 8, cl. 18.

it is a bare majority of a bare quorum.⁵⁹ The High Court can decide a case 9–0 or 5–4 or 5–1 or 4–2.⁶⁰ But not 5–0 or 3–2 or 4–1.

The quorum statute and other rules dictate how cases are decided, but another rule dictates how cases are not decided. Throughout its history, the Court never purported to have the authority to allow former justices to sit as substitutes in order to break a tie, and a New Deal-era statute (a vestige of President Franklin Roosevelt’s court-packing plan) appears to codify that practice.⁶¹ If the Court deadlocks, so be it. Retired Supreme Court justices can sit on lower federal courts, but not on their former High Court.⁶² Justice Potter Stewart once remarked that it was “no fun to play in the minors after a career in the major leagues.”⁶³ All the same, Justices Tom Clark, David Souter, and Sandra Day O’Connor used their comparatively early retirements to sit often with courts of appeals across the Nation.⁶⁴

a. *Recusal Rules Make SCOTUS Uniquely Vulnerable to Ties*

Unlike the Judiciary (or Congress), clear rules govern absence, recusal, or incapacity in the Executive. The Twenty-Fifth Amendment, ratified

⁵⁹ More precisely, the Supreme Court “decides” a case by a majority of those sitting, but by statute six justices must hear a case for there to be a quorum. Thus, it takes five to decide a case when there are eight or nine justices sitting. But if only six or seven justices sit, then any four can decide it. For example, in the important securities-fraud class-action case *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), Chief Justice Rehnquist and Justices Scalia and Kennedy were recused. The Court nonetheless decided the case by a 4–2 vote, with Justice Blackmun writing for himself and Justices Brennan, Marshall, and Stevens. Justices White and O’Connor dissented. When reconsidering that precedent a quarter-century later, the majority and an opinion concurring in the judgment fought over whether *Basic* was entitled to stare decisis, but neither side even mentioned *Basic*’s bare quorum or its four-justice majority, much less suggested that those features made it any less authoritative. See *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274–77 (2014) (explaining why *Basic* was entitled to stare decisis); *id.* at 297–300 (Thomas, J., concurring in judgment) (disputing the applicability of stare decisis without questioning the validity of a four-justice decision).

⁶⁰ See, e.g., *Basic*, 485 U.S. 224.

⁶¹ 28 U.S.C. § 294(d) (describing the procedure for designating and assigning retired judges and justices to sit in lower federal courts but stating that no designations or assignments of lower-court judges “shall be made to the Supreme Court”); see also McElroy & Dorf, *supra* note 15, at 83.

⁶² § 294(d); see also Jess Bravin, *Welcome Back, Souter (and O’Connor and Stevens)*, WALL ST. J. L. BLOG (Sept. 29, 2010, 2:02 PM), <http://blogs.wsj.com/law/2010/09/29/welcome-back-souter-and-oconnor-and-stevens> [<https://perma.cc/NAK7-Q5RX>] (“[R]etired justices Sandra Day O[’]Connor and David Souter help decide mundane disputes before federal circuit courts, but are disqualified from the job they know best.”).

⁶³ Jess Bravin, *Change of Venue: In Retirement, Justice O’Connor Still Rules*, WALL ST. J. (Aug. 11, 2009, 12:01 AM), <https://www.wsj.com/articles/SB124994271588320565> [<https://perma.cc/97FU-LL3T>].

⁶⁴ See *id.* (“As a substitute judge, Justice O’Connor has heard nearly 80 cases and written more than a dozen opinions.”); Bravin, *supra* note 62; Tom C. Clark, *Former Justice, Dies; On the Supreme Court for 18 Years*, N.Y. TIMES (June 14, 1977), <https://www.nytimes.com/1977/06/14/archives/tom-c-clark-former-justice-dies-on-the-supreme-court-for-18-years.html> [<https://perma.cc/PYU3-UNP6>] (“He was believed to be the only retired Justice in history to sit on all 11 circuits.”).

following President Kennedy's assassination, makes the Vice President the Acting President when the President is "unable to discharge the powers and duties of his office."⁶⁵ But the Constitution says nothing about a Supreme Court justice's inability to discharge powers and duties, either for a short time (as with a temporary physical issue) or indefinitely (as with a permanent mental issue). The only vehicle for forced removal is impeachment.⁶⁶ And the lone relevant statutory authority seems to foreclose the temporary replacement of an absent or recused justice.⁶⁷

Because these structural conditions make tie votes statistically inevitable, the Court has had to determine the legal effect of a tie. The rule of affirmance by an equally divided Court derives from a Latin maxim: *semper praesumitur pro negante*—that is, the presumption is always in favor of the one who denies.⁶⁸ As Justice Field put it in 1868, "It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made."⁶⁹ This ancient principle applies in legislative bodies too.⁷⁰

The rule of affirmance by an equally divided Court has been criticized by Professor Thomas Baker as "an internal procedural finesse . . . not required by the Constitution or by any statute."⁷¹ He would prefer that "[s]omeone on the Court [be] willing to compromise and change his or her vote to settle an important issue and to move the policy question back to Congress."⁷²

The Court must apply this rule most often when a justice recuses, typically for one of three reasons: (1) a personal or familial interest in the case (stock ownership or a close family member who works for a party or law firm involved in the case); (2) prior involvement in the case (as a lawyer or lower-court judge); or (3) a non-case-related need to recuse because of the particular

⁶⁵ U.S. CONST. amend. XXV, §§ 3, 4.

⁶⁶ See U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

⁶⁷ 28 U.S.C. § 294(d) (providing for the substitution of retired judges to the courts of appeals and district courts but stating that "[n]o such designation or assignment shall be made to the Supreme Court").

⁶⁸ AMERICAN LEGAL ENCYCLOPEDIA, <http://lawi.us/semper-praesumitur-pro-negante> [<https://perma.cc/NSF7-R8UX>] (last visited Dec. 2, 2020).

⁶⁹ *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1868).

⁷⁰ See Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 974 (1989) (tracing the principle back to Aeschylus' Eumenides, where Athena's vote to acquit might have created a tie vote, a scene "plainly meant to signal the beginning of both democracy and the reign of law"); *id.* at 1010 (explaining that legislation cannot pass under a tie vote "because of the ancient rule that a motion needs a majority to pass").

⁷¹ Baker, *supra* note 12, at 130.

⁷² *Id.* (arguing that the justices "failed" their "institutional responsibility to administer the national law" by dividing equally in *Free v. Abbott Lab'ys, Inc.*, 592 U.S. 333 (2000)).

issue the case raises.⁷³ Recusal for illness or other reasons is also possible, but as described below, 4–4 ties are rare in those circumstances.

The first category (personal or familial interest) is the clearest and subject to the most objective rules. Its application is harsh—owning a single share of a stock will trigger recusal.⁷⁴ But it often is also remediable. Federal judges who initially recuse from a case sometimes return to the bench, for example, if they sell the stock that necessitated the recusal.⁷⁵

The second category (prior involvement in the case) typically affects justices only early in their tenures.⁷⁶ For example, justices promoted to the Supreme Court from circuit courts typically recuse themselves from cases (including at the certiorari stage) that had been pending before their previous courts, while they were judges there. Chief Justice Roberts and Justices Alito, Sotomayor, Gorsuch, Kavanaugh, and Barrett were promoted to the Supreme Court from federal circuit courts. Once they became justices, they followed this practice of recusal.⁷⁷ With each passing Term, the need for such recusals diminished.

Justices coming from the Executive Branch face even greater recusal obligations. For example, Justice Thurgood Marshall, former Second Circuit Judge and U.S. Solicitor General, recused himself in fifty-seven percent of cases decided in his first Term on the Court.⁷⁸ More recently, Justice Kagan,

⁷³ See generally 28 U.S.C. § 455; Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1547 (2012) (describing recusal in practice as being within the judge's discretion).

⁷⁴ § 455(d)(4) (“[F]inancial interest’ means ownership of a legal or equitable interest, *however small . . .*” (emphasis added)); *An Open Discussion with Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1038 (2004) [hereinafter *Open Discussion*] (recalling a case on which she recused until selling her share in a company).

⁷⁵ See *Open Discussion*, *supra* note 74, at 1038.

⁷⁶ § 455(b)(2), (3).

⁷⁷ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (Chief Justice Roberts did not participate because he was on the panel at the D.C. Circuit in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005)); *Beard v. Banks*, 548 U.S. 521 (2006) (Justice Alito did not participate because he was on the panel at the Third Circuit in *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005)); *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) (Justice Sotomayor did not participate because she was originally on the panel at the Second Circuit in *Connecticut v. Am. Elec. Power Co., Inc.*, 582 F.3d 309, 313 n.* (2d Cir. 2009), though she was elevated to the Supreme Court before a decision was reached there); *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (Justice Gorsuch did not participate in *Sharp* because he was on the Tenth Circuit for *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017); the Court initially deadlocked, but later resolved the case by relying on *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), a case that presented the same issue without the recusal conflict); *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759, 203 L. Ed. 2d 53 (2019) (Justice Kavanaugh recused because he was on the D.C. Circuit at the time of the challenged decision, *Jam v. Int’l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017)); *Walton v. First Merch.’s Bank*, No. 20-311, 2020 WL 7132748 (U.S. Dec. 7, 2020) (Justice Barrett recused from the denial of rehearing following denial of certiorari, having been on the panel that issued the challenged Seventh Circuit decision, 820 F. App’x 450 (7th Cir. 2020)).

⁷⁸ Noah M. Schubert, *Replacement Justice on the United States Supreme Court: The Use of Temporary Justices to Resolve the Recusal Conundrum*, 46 UNIV. S.F. L. REV. 215, 218 (2011) (citing Tom Goldstein, *An Update on Recusal*, SCOTUSBLOG (Oct. 3, 2010)). Justice Marshall recused himself

who also served as Solicitor General, recused herself from roughly one-third of the Court's merits cases during her first Term.⁷⁹ In fact, the specter of frequent recusal was one of the arguments lodged against her confirmation—that the Court would be short-staffed for several high-stakes cases.⁸⁰ Two 4–4 splits resulted that Term: (1) a highly anticipated copyright infringement case involving gray-market goods;⁸¹ and (2) the constitutionality of a citizenship-transmission statute that favored the citizenship claims of nonmarital children born abroad to U.S.-citizen mothers over U.S.-citizen fathers.⁸² Court watchers were disappointed. As to the copyright nondecision, “The justices’ 4–4 tie left the question unanswered, to the disappointment of the many people watching the Court and hoping for a definitive resolution.”⁸³ As to the citizenship case—when the Court gave dads an unwanted “tie” a week before Father’s Day—many decried “a waste of judicial resources (it takes a long time and a lot of work for the Court to decide a case) and a wasted opportunity to make law on a presumably important issue.”⁸⁴

The third category, while the rarest, can be the most challenging for the Court as an institution. A need to recuse because of the presence of a particular issue is not easily cured by selling stock or taking a case from a different party posing no conflict, as with the first category, nor does it naturally dissipate after a few early Terms, as with the second. If a justice must always recuse when a particular issue is raised, and the remaining justices are evenly divided, this means that the Court will be unable to resolve the issue at all until either the recusing justice is replaced or another justice’s replacement takes the opposite view. Justice Scalia, for example, recused himself in 2004 in *Elk Grove Unified School District v. Newdow*,⁸⁵ a case involving the constitutionality of the phrase “under God” in the Pledge of Allegiance, after having publicly stated that he disagreed with the Ninth

in sixty-one cases, fifty-three of which were related to his service as solicitor general. See McElroy & Dorf, *supra* note 1537, at 96 n.65.

⁷⁹ McElroy & Dorf, *supra* note 15, at 82.

⁸⁰ See Tom Goldstein, *Elena Kagan and Recusal—UPDATED*, SCOTUSBLOG (Apr. 18, 2010, 6:20 PM), <https://www.scotusblog.com/2010/04/elena-kagan-and-recusal> [<https://perma.cc/M5WW-C9HR>].

⁸¹ *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2011) (per curiam), *aff’g by an equally divided court* 541 F.3d 982 (9th Cir. 2008).

⁸² *Flores-Villar v. United States*, 564 U.S. 210 (2011) (per curiam), *aff’g by an equally divided court* 536 F.3d 990 (9th Cir. 2008).

⁸³ Lisa M. Tittmore, *With Supreme Court Deadlock, Cloud Lingers Over Gray Market Goods*, SUNSTEIN, <http://sunsteinlaw.com/publications/with-supreme-court-deadlock-cloud-lingers-over-gray-market-goods> [<https://perma.cc/8ALA-8U58>].

⁸⁴ Lisa McElroy, *This Week at the Court: In Plain English*, SCOTUSBLOG (June 15, 2011, 2:43 PM) <http://www.scotusblog.com/2011/06/this-week-at-the-court-in-plain-english-6> [<https://perma.cc/S9DG-JCTL>].

⁸⁵ 542 U.S. 1, 3 (2004).

Circuit's conclusion on the merits of the challenge.⁸⁶ The remaining justices resolved the case without a 4–4 split. But they did so without reaching the merits—instead relying on the nebulous doctrine of “prudential standing.”⁸⁷

Ties occur in criminal cases, too, with deadlock in death penalty cases the starkest example. In 2001, the Supreme Court decided *Beazley v. Johnson* with a bare six-justice quorum.⁸⁸ *Beazley* involved the death of a federal appellate judge's father, and three justices recused themselves given their close relationship with the victim's son (who had clerked for one justice and assisted in the confirmation of two others).⁸⁹ The Court divided 3–3 on whether to stay the execution pending certiorari, prompting this criticism: “A tie shouldn't go to the executioner.”⁹⁰

Besides recusals, a 4–4 tie is also possible when there's a lengthy absence on the Court. A vacancy on the Court sometimes goes unfilled for a long time. Or a justice might take time away for health reasons or for other duties of unusual importance. For instance:

- Three chief justices have presided over courts of impeachment.⁹¹ The first two chief justices were forced to miss sessions of the Court. In fact, Chief Justice Chase's absence during the impeachment trial of President Andrew Johnson was listed as a basis for reargument of the canonical case *Ex parte McCardle*.⁹²
- Justice Robert Jackson's service as chief prosecutor at the Nuremberg Trials from 1945 to 1946 meant that he was physically absent during a

⁸⁶ Linda Greenhouse, *Supreme Court to Consider Case on 'Under God' in Pledge to Flag*, N.Y. TIMES (Oct. 15, 2003), <https://www.nytimes.com/2003/10/15/us/supreme-court-to-consider-case-on-under-god-in-pledge-to-flag.html> [<https://perma.cc/LAJ4-RGCL>].

⁸⁷ *Newdow*, 542 U.S. at 17–18.

⁸⁸ 533 U.S. 969 (2001) (noting that Justices Scalia, Souter, and Thomas abstained).

⁸⁹ Raymond Bonner, *Three Abstain as Supreme Court Declines to Halt Texas Execution*, N.Y. TIMES (Aug. 14, 2001), <https://www.nytimes.com/2001/08/14/us/three-abstain-as-supreme-court-declines-to-halt-texas-execution.html> [<https://perma.cc/8DRD-7DQP>] (quoting George Kendall of the NAACP Legal Defense and Education Fund).

⁹⁰ *Id.* To be fair, the more accurate description is that a tie goes to whoever doesn't need the Court to do anything. Thus, if a lower court stays an execution, and the Supreme Court ties on whether to lift it, the stay would remain in place, meaning the execution would not proceed.

⁹¹ See Frank Bowman, *The Role of the Chief Justice in an Impeachment Trial*, SCOTUSBLOG (Jan. 10, 2020, 11:18 AM), <https://www.scotusblog.com/2020/01/the-role-of-the-chief-justice-in-an-impeachment-trial> [<https://perma.cc/A57C-UTL2>] (discussing how Chief Justice Salmon Chase presided over President Andrew Johnson's impeachment trial, Chief Justice Rehnquist presided over President Bill Clinton's impeachment trial, and Chief Justice Roberts presided over President Donald Trump's first impeachment trial).

⁹² 74 U.S. (7 Wall.) 506, 509 (1868) (reporter's statement of the case) (noting that “the Chief Justice being detained from his place here, by his duties in the Court of Impeachment,” lead to reargument the next Term).

substantial number of arguments. To break ties, the Court ordered three rearguments upon his return.⁹³

- When recovering from a serious injury after being thrown from a horse, Justice William O. Douglas missed arguments from October 1949 until March 1950.⁹⁴

- In early 1985, Justice Lewis Powell, who occupied the Court's ideological center, missed fifty-six oral arguments while ill.⁹⁵ Eight cases deadlocked 4–4, and five others were reargued.⁹⁶ (It's unclear why the Court exercised discretion to reargue some cases while non-precedentially affirming others.) One notable example: In December 1987, before Anthony Kennedy was confirmed as Justice Powell's successor, the Court deadlocked on the constitutionality of laws restricting minors' access to abortions.⁹⁷

- Chief Justice Rehnquist missed forty-four oral arguments while receiving treatment for thyroid cancer in 2004 and 2005, declining to participate except when needed to break a tie.⁹⁸

- While the “Scalia seat” sat vacant for a record-setting 422 days⁹⁹—the better part of two Terms—the Court endured deadlock (and thus, at minimum, delayed rulings) in multiple divisive cases.¹⁰⁰

As was the case following Justice Scalia's death, a vacancy on the Supreme Court may go unfilled for a long time, not because of a sitting justice's health

⁹³ Jeffrey D. Hockett, *Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial*, 1990 SUP. CT. REV. 257, 279 (quoting a letter from Chief Justice Harlan F. Stone explaining that the eight-justice Court had led to a number of 4–4 splits requiring reargument, three of which he was to announce that day).

⁹⁴ BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 360, 367 (1979).

⁹⁵ Stuart Taylor, Jr., *Tie Vote: What Happens*, N.Y. TIMES (Oct. 5, 1987), <http://www.nytimes.com/1987/10/05/us/tie-vote-what-happens.html> [<https://perma.cc/3CA9-9MRV>]; see also Powell Has Operation for Cancer of Prostate, N.Y. TIMES (Jan. 5, 1985), <https://www.nytimes.com/1985/01/05/us/powell-has-operation-for-cancer-of-prostate.html> [<https://perma.cc/Z3LR-2DCC>].

⁹⁶ Taylor, *supra* note 95.

⁹⁷ Linda Greenhouse, *Battle Over; Now, a War*, N.Y. TIMES (July 5, 1989), <http://www.nytimes.com/1989/07/05/us/battle-over-now-a-war.html> [<https://perma.cc/S7MU-5X9A>].

⁹⁸ Charles Lane, *Rehnquist Won't Vote in Every Case Heard This Term*, WASH. POST (Dec. 14, 2004), <https://www.washingtonpost.com/archive/politics/2004/12/14/rehnquist-wont-vote-in-every-case-heard-this-term/b4ff02b1-ofao-495d-b89a-196166db3c94> [<https://perma.cc/GGW2-XQY8>]; Mark Sherman & Jessica Gresko, *Chatty Thomas Breaks with Precedent*, ASSOCIATED PRESS (May 6, 2020), <https://apnews.com/article/24dob14b7ba98d1976ebff7106582f> [<https://perma.cc/62MP-T3MS>].

⁹⁹ Alana Abramson, *Neil Gorsuch Confirmation Sets Record for Longest Vacancy on 9-Member Supreme Court*, TIME (Apr. 7, 2017, 12:20 PM), <https://time.com/4731066/neil-gorsuch-confirmation-record-vacancy> [<https://perma.cc/XAH6-5CYX>].

¹⁰⁰ See *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam) (mem.); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (per curiam) (mem.); *Hawkins v. Cmty. Bank*, 136 S. Ct. 1072 (2016); *Dollar Gen. Corp. v. Miss. Bank of Choctaw Indians*, 136 S. Ct. 2159 (2016); see also *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277 (2016) (affirming by an equally divided Court on one of two issues).

or choices, but because there is no sitting justice. In 1969, after Justice Abe Fortas resigned from the Court amid controversy, President Nixon struggled to get a successor confirmed.¹⁰¹ The Fortas seat sat vacant for more than a year before Justice Harry Blackmun—Nixon’s third choice—took office.¹⁰² “During this period eight cases yielded 4–4 decisions, and 18 cases had to be reargued.”¹⁰³

b. *At Least Partly to Avoid Ties, Supreme Court Recusal is Uniquely Disfavored*

Justice Scalia himself emphasized the disturbing threat of seemingly endless stalemate when he denied the Sierra Club’s recusal motion based on his 2002 duck hunting trip with Vice President Cheney (coincidentally enough, less than a week before the argument in *Newdow*, in which he did recuse).¹⁰⁴ A Court of eight, he explained, often “will find itself unable to resolve the significant legal issue” presented.¹⁰⁵ “Even one unnecessary recusal impairs the functioning of the Court.”¹⁰⁶ For example, if the issue in *Newdow* had returned to the Court before Justice Scalia passed away, and if Justice Scalia still deemed himself disqualified, we likely would still be without an authoritative answer; the seats of the four justices who left the Court between

¹⁰¹ Blackman & Shapiro, *supra* note 1; see also Andrew Hamm, *Legal History Highlight: The Failed Election-Year Nomination of Abe Fortas*, SCOTUSBLOG (Mar. 10, 2016, 4:03 PM), <https://www.scotusblog.com/2016/03/legal-history-highlight-the-failed-election-year-nomination-of-abe-fortas> [<https://perma.cc/Y4KD-CU6S>].

¹⁰² Blackman & Shapiro, *supra* note 1; Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES (Mar. 4, 2004), <https://www.nytimes.com/2004/03/04/us/documents-reveal-the-evolution-of-a-justice.html> [<https://perma.cc/EUX3-LY73>] (“Harry Blackmun was President Nixon’s third choice, ‘Old No. 3,’ as he liked to call himself.”).

¹⁰³ Blackman & Shapiro, *supra* note 1. The hand of fate also plays a role. When Justice Stone fell ill, the Court held over *West Coast Hotel Co. v. Parrish* because “an evenly divided Court was thought an ‘unfortunate outcome.’” Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 638 (1994); see also *West Coast Hotel*, 300 U.S. 379 (1937) (upholding the constitutionality of state minimum wage legislation). A quarter-century later in *NAACP v. Button*, Justice Frankfurter had initially circulated a draft majority upholding the law, but then Justice Whittaker resigned for health reasons, leaving the Court (apparently) divided 4–4. Reargument was ordered for the next Term, but by then, Justice Frankfurter had suffered a stroke and resigned. With two new members, the Court voted 6–3 the other way. See, e.g., Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. OF LEGAL HIST. 355, 373–76 (2006); see also *Button*, 371 U.S. 415 (1963) (striking down a Virginia barratry law that would have impeded the NAACP’s role in desegregation cases post-*Brown*).

¹⁰⁴ *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 914–15 (2004) (memorandum of Scalia, J.) (describing the motion to recuse); *id.* at 916 (noting his recusal in *Newdow*).

¹⁰⁵ *Id.* at 915.

¹⁰⁶ *Id.* at 916 (quoting Rehnquist, Stevens, O’Connor, Scalia, Kennedy, Thomas, and Ginsburg, JJ., *Statement of Recusal Policy*, Nov. 1, 1993, reprinted in RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 1101–03 (2d ed., 2007)).

2004 and Justice Scalia's death were all filled by new Justices whose views would probably not have differed sharply from their predecessors'.¹⁰⁷

Chief Justice Roberts made a similar point in his 2011 *Year-End Report on the Federal Judiciary*. Lower-court judges can recuse knowing that another judge (even a retired judge or one from a different court) can fill the vacancy, but "[a Supreme Court] Justice . . . cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case."¹⁰⁸

The High Court does try to avoid 4–4 splits. By the Justices' own admissions, practical considerations impact their recusal decisions. The Court's 1993 Statement of Recusal Policy, cited by Justice Scalia in his *Cheney* memorandum, details recusal principles when a law firm associated with a Justice's close relative appears before the Court. It suggests that the lack of judicial substitution warrants a less-rigid recusal standard for the Court than for lower-court judges.¹⁰⁹ While Justice Stevens said that Justices should recuse without thought to collateral consequences,¹¹⁰ other Justices have confirmed that functional factors, like avoiding 4–4 procedural affirmances, are at work. Chief Justice Rehnquist, in a memorandum explaining his refusal to disqualify himself in a case, described a SCOTUS Justice's duty to sit as "stronger" than a lower-court judge's duty, given the statutory prohibition on filling recusal-based vacancies.¹¹¹ Chief Justice Rehnquist was disapproving of "bending over backwards . . . to deem oneself unqualified."¹¹² In fact, as he battled thyroid cancer, he announced he would only participate in cases when necessary to prevent a tie vote.¹¹³ Justice Ginsburg agreed on the undesirability of tie votes: "Because there's no substitute for a Supreme Court Justice, it is important that we not lightly recuse ourselves."¹¹⁴ After Justice O'Connor retired in 2006, three cases that could have ended in stalemate were reargued after Justice Samuel Alito was confirmed to replace her.¹¹⁵

¹⁰⁷ Chief Justice Rehnquist was replaced by Chief Justice Roberts, Justice O'Connor by Justice Alito, Justice Souter by Justice Sotomayor, and Justice Stevens by Justice Kagan.

¹⁰⁸ CHIEF JUSTICE'S YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/43SK-Y67P>].

¹⁰⁹ Rehnquist et al., *supra* note 106; *see also* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 681 (2005).

¹¹⁰ *See* McElroy & Dorf, *supra* note 15, at 100–01 n. 80 ("Standards of recusal are totally independent of what would occur after recusal").

¹¹¹ Laird v. Tatum, 409 U.S. 824, 837 (1972) (memorandum of Rehnquist, J.).

¹¹² *Id.* at 838 (quotation marks omitted).

¹¹³ Lane, *supra* note 98.

¹¹⁴ *Open Discussion*, *supra* note 74, at 1039.

¹¹⁵ *See* Hudson v. Michigan, 547 U.S. 586 (2006); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Kansas v. Marsh*, 548 U.S. 163 (2006); *see also* Stephen Wermiel, *SCOTUS for Law Students: Rearguments*,

Unnecessary recusals are, therefore, a last resort and never a first impulse. Recusals are always undesirable, especially when the Court is weighing a circuit split. Imagine this hypothetical (set prior to the Court's decision in *Carpenter v. United States*¹¹⁶): The Court grants two petitions on the constitutionality of the National Security Agency's bulk, warrantless collection of Americans' phone records. One court of appeals has struck down NSA's metadata program; the other has upheld it. Justice Kagan recuses herself, having formulated the government's legal position while Solicitor General. The Court deadlocks 4–4 along familiar lines. Constitutional chaos ensues, as both lower-court judgments are affirmed, meaning the NSA program is constitutional in some parts of the country but unconstitutional in other parts—something Chief Justice Rehnquist described as “one rule in Athens, and another rule in Rome.”¹¹⁷ Indeed, other circuits—Florence and Venice—may have also chimed in with altogether different interpretations. The disputed law may be federal, but it is not national.

Or consider how differently the “Obamacare” drama would have ended had Justice Kagan recused herself in the original Affordable Care Act case from 2012.¹¹⁸ Shortly after the decision was issued, it was widely reported that the Court had originally voted 5–4 to strike down the individual mandate, but that Chief Justice Roberts later flipped to uphold the mandate under Congress' taxing power.¹¹⁹ Yet had Justice Kagan recused herself, the original vote presumably would have been 5–3 against the mandate. A later vote switch by the Chief Justice would have meant 4–4 deadlock. It's difficult to imagine the Court unable to decide the most high-profile case in recent memory. Or perhaps the Chief Justice would not have changed his vote, meaning the Eleventh Circuit's decision (the case the Court granted) striking

SCOTUSBLOG (Oct. 31, 2014, 8:00 AM), <https://www.scotusblog.com/2014/10/scotus-for-law-students-rearguments> [<https://perma.cc/W3TU-JC5T>] (“A similar practice occurred when Justice Alito replaced Justice O'Connor in January 2006. Two cases, *Hudson v. Michigan* and *Kansas v. Marsh*, were reargued after Alito arrived and when his vote was required to resolve a four-to-four deadlock.”).

¹¹⁶ *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (concluding that obtaining cell-site location information from a wireless carrier is a Fourth Amendment search for which the government must generally obtain a warrant supported by probable cause).

¹¹⁷ *Laird v. Tatum*, 409 U.S. 824, 838 (1972) (memorandum of Rehnquist, J.).

¹¹⁸ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

¹¹⁹ Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law> [<https://perma.cc/2BFA-ZBV6>].

down the ACA would have stood.¹²⁰ Meanwhile the Sixth Circuit and D.C. Circuit had issued decisions upholding the individual mandate.¹²¹

It's no wonder that the Supreme Court avoids tie votes if at all possible. Professors Reynolds and Young tally 123 "equal divisions" between 1925 and 1982—seventy-five percent resulting from a recusal or temporary absence, and twenty-five percent resulting from a Court vacancy.¹²² And a recent analysis in the wake of Justice Scalia's death pointed out that since World War II, when the High Court has split evenly, "25 times the court affirmed the lower-court judgment without opinion (or precedential value) and 54 times the court set the case for reargument."¹²³

c. *Plenty Have Proposed Solutions to SCOTUS Ties*

Admittedly, split decisions don't happen every Term,¹²⁴ but they happen often enough to raise concern.¹²⁵ Each stalemate exacts an enormous price.

¹²⁰ See *Florida ex rel Att'y Gen. v. U.S. Dep't of Health & Hum. Servs.*, 648 F.3d 1235, 1282 (11th Cir. 2011) ("We conclude that the individual mandate exceeds Congress's commerce power"); Steven M. Klepper, *The Practical Implications of Recusal of Supreme Court Justices*, 73 MD. L. REV. ENDNOTES 13, 15 (2013) (discussing the effect of the possible recusal of Justice Kagan on the fate of the ACA).

¹²¹ See *Thomas More L. Ctr. v. Obama*, 651 F.3d 529, 534 (6th Cir. 2011) (affirming the ACA as a valid exercise of Congress's commerce power); *Seven-Sky v. Holder*, 661 F.3d 1, 4 (D.C. Cir. 2011) (affirming the constitutionality of the ACA).

¹²² William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 30, 36 n.34 (1983–84).

¹²³ Blackman & Shapiro, *supra* note 1 (noting that only twenty-five of those fifty-four reargued cases ended up 5–4).

¹²⁴ Black & Epstein, *supra* note 37, at 90. The authors suggest that perhaps 4–4 splits are so few because Justices are more apt to recuse in cases they think will not divide 4–4. *Id.* at 95. Or maybe a Justice holds her nose and votes strategically to join a 5–3 decision she doesn't like because she fears a future decision "may be even more distant from her policy preferences." *Id.* at 96. Or a Justice may simply change his vote "for institutional reasons," *id.*, as Justice Frankfurter apparently did in *Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138, 141 (1959), lest a case "be cast into the limbo of unexplained adjudications." *Id.* Justices White and Blackmun similarly voted to avoid splits. See *Spinelli v. United States*, 393 U.S. 410, 429 (1969) (White, J., concurring) ("I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided Court."); *United States v. Harris*, 403 U.S. 573, 586 (1971) (Blackmun, J., concurring) (using the exact same language as Justice White).

¹²⁵ Tellingly, Justice Scalia has implied that the Court has relatively few recusals because there's no replacement mechanism. See generally *Cheney v. U.S. Dist. Ct.*, 541 U.S. 913 (2004) (memorandum of Scalia, J.). He suggests recusals would happen more frequently if there were a tiebreaking procedure. *Id.* Justice Breyer told a House committee, "You have a duty to sit because there is no one to replace me if I take myself out, and that could sometimes change the result." John Gibeaut, *Sitting This One Out: Health Care Case Again Raises Recusal Controversy*, A.B.A. J. (Mar. 1, 2012), https://www.abajournal.com/magazine/article/sitting_this_one_out_health_care_case_again_raises_recusal_controversy [<https://perma.cc/3XAB-YLME>]. Would former Solicitor General Kagan have recused herself in the first ACA challenge had there been a designation policy in place—for example, if she knew that retired Justice Stevens might have taken her place? Strategic behavior might color

Obviously, the Court and the parties have expended tremendous resources to resolve an issue the Court believes should be resolved—yet there is no resolution. The nation gets conflict rather than consistency. A law’s constitutionality may remain unsettled indefinitely—as, for instance, if the pledge’s constitutionality, dodged in *Newdow*, returned to a divided Court.¹²⁶ The potential disarray could be stark. Many citizens live in New Jersey but work in Manhattan, separated only by the Hudson River, yet a law’s interpretation may mean one thing in Newark (the Third Circuit) and the polar opposite in New York (the Second Circuit). Worse than thwarting “equal justice under law,” that circumstance—if extended indefinitely—could subject the same person to completely different applications of supposedly uniform federal law.

There are proposals galore to help the Court to avoid 4–4 stalemates. Justice Stevens favored enlisting willing retired SCOTUS Justices—who can already sit in lower federal courts—an idea he said Chief Justice Rehnquist also supported.¹²⁷ In September 2010, barely one month after then-brand-new Justice Kagan recused herself in roughly one-third of the Court’s docket, Senator Patrick Leahy introduced a bill to allow a majority of active SCOTUS Justices to designate a retired justice.¹²⁸

recusal decisions, at least subconsciously. Imagine a controversial case that a Justice suspects will be decided 5–4 the way she wishes. But if she recuses and is likely to be replaced by someone she considers an ideological foe, the other side would claim the five-justice majority. Two law professors, recognizing that a justice may resist recusal if it means the designation of an unlike-minded replacement, have proposed a lottery system. McElroy & Dorf, *supra* note 15, at 101, 103.

¹²⁶ See *supra* notes 85–86 and accompanying text.

¹²⁷ McElroy & Dorf, *supra* note 15, at 83 n. 7. Sometimes, though, there are no retired justices, as in the span of years before Justice O’Connor left the bench in 2006: Chief Justice Burger retired on September 26, 1986 and died on June 25, 1995; Justice Powell retired on June 26, 1987 and died on August 25, 1998; Justice Blackmun retired on August 3, 1994 and died on March 4, 1999. *Justices 1789 to Present*, SUPREME COURT OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/8CKA-6WZE>] (last visited Nov. 20, 2020); *Justices*, OYEZ, <https://www.oyez.org/justices> [<https://perma.cc/57AU-7FRL>] (last visited Nov. 20, 2020); *Warren E. Burger*, OYEZ, https://www.oyez.org/justices/warren_e_burger [<https://perma.cc/RZFF-CWP6>] (last visited Nov. 21, 2020); *Lewis F. Powell, Jr.*, OYEZ, https://www.oyez.org/justices/lewis_f_powell_jr [<https://perma.cc/4CZ5-8GBF>] (last visited Nov. 21, 2020); *Harry A. Blackmun*, OYEZ, https://www.oyez.org/justices/harry_a_blackmun [<https://perma.cc/H6D4-TXBT>] (last visited Nov. 21, 2020).

¹²⁸ S. 3871, 111th Cong. § 1 (2010). Scholars have discussed the Leahy proposal in depth. See generally McElroy & Dorf, *supra* note 15 (discussing the proposal’s complications as well as the benefits of avoiding the unlikely 4–4 tie); Rebekah Saidman-Krauss, Comment, *A Second Sitting: Assessing the Constitutionality and Desirability of Allowing Retired Supreme Court Justices to Fill Recusal-Based Vacancies on the Bench*, 116 PENN. ST. L. REV. 253, 267 (2011) (arguing that Senator Leahy’s proposal is a beneficial innovation and preferable to alternative solutions to recusal-based vacancies).

Senator Leahy’s proposal raises many questions. Can the recused justice help select the retired justice? See McElroy & Dorf, *supra* note 15, at 103 n.91 (flagging the bill’s lack of clarity on this point). If so, is that “essentially voting by proxy”—picking someone most apt to vote the way the recused justice would have voted? See Saidman-Krauss, *supra* at 281. If the recused justice cannot vote on the replacement justice, what happens if the remaining eight justices deadlock? Does nobody

Professors Reynolds and Young take particular aim at the rule of affirmance by an equally divided Court. They contend that in the appellate context, sometimes “[the] policies supporting reversal may outweigh those supporting affirmance.”¹²⁹ For example, they argue, when a lower court strikes down a federal statute as unconstitutional, a 4–4 Supreme Court should require reversal given the presumption of constitutionality.¹³⁰ Similarly, a 4–4 tie in a criminal case would produce a reversal of a conviction.¹³¹ Notably, the professors themselves tie 1–1 when their two proposed rules collide: “[W]hen the Court divides on the constitutionality of a federal statute challenged on constitutional grounds by a criminal defendant.”¹³² How do they resolve their stalemate? By reverting to a SCOTUS-like rule: “The authors, being divided evenly here, cannot make a recommendation on this issue.”¹³³ Professor Baker, in fact, argues that a 4–4 split should be resolved through some sort of vote switching.¹³⁴ Indeed, he would prefer that someone flip his or her vote so that the legal question is decided and the policy question is returned to Congress.¹³⁵

Although federal law bars the assignment of temporary SCOTUS Justices, meaning ties go unbroken, the same is not true in most state supreme courts. Even so, some state high courts mimic the federal High Court.

get appointed? The Court splits 4–4 most often in ideologically divisive cases. Does that suggest the four liberal justices would strategically resist enlisting a retired colleague if they suspect she might vote with the four conservatives, and vice versa? Might they favor stalemate, even one that affirms a conservative lower-court victory, over a High Court judgment that broadens it nationwide? Might the four justices who voted to grant certiorari push for a particular retired justice, effectively winning the case “before it is even argued?” See McElroy & Dorf, *supra* note 15, at 101 n. 83. Even if the selection method were random, what if the justice pondering recusal suspects the odds are slim that a like-minded ally will be chosen? Or what if the chief justice, rather than the Court as a whole, is empowered to designate someone unilaterally? Does that vest him with lopsided power, essentially giving him two votes? See Saidman-Krauss, *supra* at 281–82 (fretting the risk of such disproportionate influence); see also *infra* Section III.B (highlighting the problems that can arise when the chief justice of a state supreme court picks a temporary justice).

¹²⁹ Reynolds & Young, *supra* note 122, at 46.

¹³⁰ *Id.* at 50.

¹³¹ See *id.* at 52–53 (arguing that “[o]ur system of criminal justice evidences a great concern that persons not be convicted of crimes unless clear law as applied to clear fact so warrants”; therefore, “a conviction should not be sustained unless affirmed by a majority of the highest court to hear the case”).

¹³² *Id.* at 52.

¹³³ *Id.* at 53 n.105.

¹³⁴ See Baker, *supra* note 12, at 136 (describing how justices have historically suppressed their own preferences to settle a case and arguing that modern justices should be willing to do the same). Of course, this raises the obvious question of which justice ought to switch votes.

¹³⁵ *Id.* at 130.

2. Survey Says: Seventeen States SCOTUS's "Ties Happen" Approach

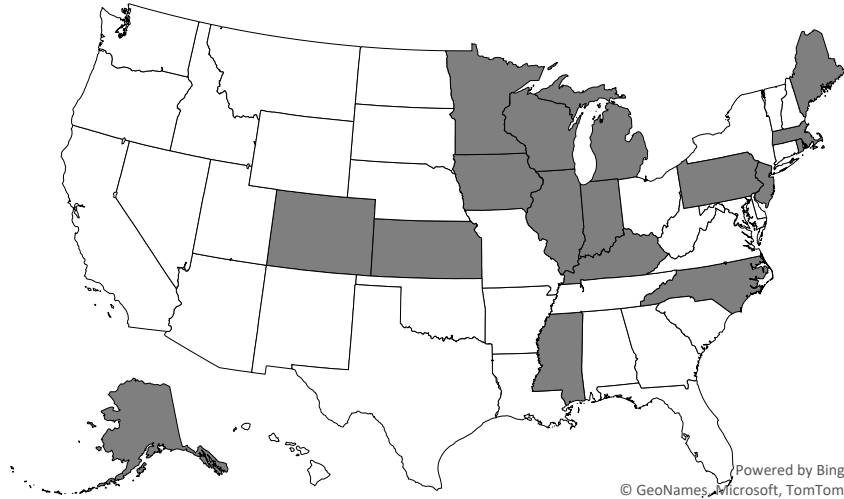


Figure 2: *Ties Happen*
17 States Affirm by an Equally Divided Court

Like SCOTUS, seventeen state high courts follow the no-tiebreaker approach: Alaska,¹³⁶ Colorado,¹³⁷ Illinois,¹³⁸ Indiana,¹³⁹ Iowa,¹⁴⁰ Kansas,¹⁴¹

¹³⁶ ALASKA R. APP. P. 106(a) (“[A]ny issue or point on appeal on which the justices are equally divided is affirmed in that appeal . . .”).

¹³⁷ COLO. APP. R. 35(b) (“When the supreme court acting en banc is equally divided in an opinion, the judgment being appealed will stand affirmed.”).

¹³⁸ See *Perlman v. First Nat’l Bank of Chi.*, 331 N.E.2d 65, 66 (Ill. 1975) (per curiam) (“[I]t is preferable . . . to follow substantially the procedure that is employed by the Supreme Court of the United States when the judges of that court are equally divided.”).

¹³⁹ IND. R. APP. P. 58(c) (“When the Supreme Court is evenly divided . . . the decision of the Court of Appeals shall be reinstated.”).

¹⁴⁰ IOWA CODE § 602.4107 (“When the supreme court is equally divided in opinion, the judgment of the court below shall stand affirmed, but the decision of the supreme court is of no further force or authority.”).

¹⁴¹ Unlike in many other states, Kansas law does not affirmatively state the legal effect of a tie vote. The seven-member Supreme Court of Kansas, however, has adopted an equal-division-equals-affirmance rule, relying on article III, section 2 of the Kansas Constitution, which states that at least four justices “shall be necessary for a decision.” See *Thornton v. Shore*, 654 P.2d 475 (Kan. 1982).

The general rule in this jurisdiction, and elsewhere, is that when one of the justices is disqualified to participate in a decision of issues raised in an appeal and the remaining six justices are equally divided in their conclusions the judgment of the trial court must stand. . . . The judgment of the trial court is therefore affirmed by an equally divided court.

Id.

Kentucky,¹⁴² Maine,¹⁴³ Massachusetts,¹⁴⁴ Michigan,¹⁴⁵ Minnesota,¹⁴⁶ Mississippi,¹⁴⁷ New Jersey,¹⁴⁸ North Carolina,¹⁴⁹ Pennsylvania,¹⁵⁰ Rhode Island,¹⁵¹ and Wisconsin.¹⁵²

¹⁴² See *infra* note 154.

¹⁴³ See *Day v. State Tax Assessor*, 942 A.2d 685, 686 (Me. 2008) (“Because the Court is evenly divided, we affirm the judgment.”).

¹⁴⁴ See *Fresh Pond Shopping Ctr., Inc. v. Rent Control Bd. of Cambridge*, 446 N.E.2d 1060, 1060 (Mass. 1983) (“The judgment of the Superior Court is affirmed by an equally divided court.”); *Pacella v. Milford Radio Corp.*, 476 N.E.2d 595, 595 (1985) (same). Massachusetts includes the rule in its rules of appellate procedure:

If, following allowance of an application for further appellate review, the justices of the Supreme Judicial Court are equally divided in opinion, unless a majority of the participating justices decides otherwise, the court shall issue an order noting such equal division, the effect of which shall be the same as if the court had denied the application for further appellate review.

MASS. R. APP. P. 27.1(g).

¹⁴⁵ MICH. COMP. LAWS § 600.230 (“When the justices of the supreme court are equally divided as to the ultimate decision of any case properly before the court on review, the judgment of the court below shall be affirmed.”); see also *People v. Sullivan*, 609 N.W.2d 193 (Mich. 2000) (“[T]he judgment of the Court of Appeals is affirmed by an equal division of the court.”), *aff’d by equal division* 586 N.W.2d 578 (Mich. Ct. App. 1998) (“[T]he judgment of the Court of Appeals is affirmed by an equal division of the court.”).

¹⁴⁶ See *State v. Retzlaff*, 842 N.W.2d 565, 565 (Minn. 2012) (“[U]pon an evenly divided court . . . the decision of the court of appeals . . . is, affirmed without opinion.”).

¹⁴⁷ While the Mississippi Constitution can be read to empower the Governor to appoint a tiebreaking justice, the Mississippi Supreme Court’s longstanding interpretation has been to seek a substitute justice only when necessary to reach a quorum:

Today we reiterate the long standing application of Section 165. The appointment of a special justice to this Court is appropriate where the Court lacks a quorum and where the parties are unable to agree in the selection of special justices to hear a case. However, so long as the Court has a quorum to conduct business, such an appointment is not authorized by our Constitution.

Hewes v. Langston, 853 So. 2d 1237, 1243 (Miss. 2003). The court in *Hewes* was interpreting the following section of the Mississippi Constitution: “Whenever any judge of the Supreme . . . for any reason, be unable or disqualified to preside . . . the Governor may commission another, or others, of law knowledge, to preside . . . during such disability or disqualification in the place of the judge or judges so disqualified.” MISS. CONST. art. 6, § 165.

¹⁴⁸ A clerk of the New Jersey Supreme Court confirms that while New Jersey law allows substitute justices, such appointments are never made to break a tie. Telephone and E-mail Correspondence with Gail Haney, Deputy Clerk, N.J. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

¹⁴⁹ See *Forbes Homes, Inc. v. Trimpi*, 326 S.E.2d 30, 30 (N.C. 1985) (“The remaining members of this Court being equally divided . . . the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

¹⁵⁰ See *Commonwealth v. Koch*, 106 A.3d 705, 705 (Pa. 2014) (“[T]he Court being evenly divided, the Order of the Superior Court is AFFIRMED.”); see also PA. SUP. CT. INTERNAL OPERATING PROCS. § 4(B)(3) (“When the votes [of the participating justices] are equally divided, any resulting opinions shall be designated as the ‘Opinion in Support of Affirmance’ or ‘Opinion in Support of Reversal,’ as the case may be.”).

In some of these states, like Michigan, the “no tiebreaker” approach is prescribed by law;¹⁵³ in others, like Kentucky, Minnesota, and Mississippi, fill-in justices are permitted and used to ensure a quorum or adequate number of sitting justices, but not in response to a tie.¹⁵⁴

In most no-tiebreaker states, if impasse results, the court generally issues a pro forma order or opinion citing the relevant rule or statute that a tie

¹⁵¹ In Rhode Island, the chief justice may assign retired Supreme Court justices but declines to do so in cases of an evenly divided court. *See, e.g., Meyer v. Meyer*, 68 A.3d 571, 587 (R.I. 2013) (“[T]he Family Court judgment is affirmed by an evenly divided court.”); R.I. GEN. LAWS ANN. § 8-3-8(d) (“Any [retired] justice of the supreme court . . . shall at the direction of the chief justice of the supreme court, subject to the retiree’s physical and mental competence, be assigned to perform such services as an associate justice of the supreme court as the chief justice of the supreme court shall prescribe.”); Telephone and E-mail Correspondence with Debra Saunders, Clerk, R.I. Sup. Ct. (Dec. 2015) (on file with author).

¹⁵² *See Sohn Mfg. Inc. v. Lab. & Indus. Rev. Comm’n*, 854 N.W.2d 371, 371 (Wis. 2014) (“The court is evenly divided upon the question of affirmance or reversal. That results in affirmance of the judgment of the court of appeals . . .”).

¹⁵³ *See supra* note 145.

¹⁵⁴ For discussion of Mississippi’s quorum-ensuring appointments, see *supra* note 147. The Minnesota Supreme Court calls up lower-court judges to ensure it has a quorum—even using a fancy random number generator to assign temporary justices—but, says the clerk, “There is no specific process for appointing acting justices to avoid or break a tie.” But adopting one isn’t out of the question, says the clerk, noting, “The court has not had to consider the tiebreak issue in the context of an original jurisdiction case, in which there is no ‘decision below.’” Telephone and E-mail Correspondence with Rita DeMeules, Ct. Comm’r, Minn. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

Sometimes state high courts shift gears and blaze a new trail over time. In Kentucky, where a tie vote means affirmance, the system is “rather convoluted,” says the clerk. Telephone and E-mail Correspondence with Susan Clary, Clerk, Ky. Sup. Ct. (Oct. 2015-February 2016) (on file with author). The constitution prescribes that the Governor appoints special justices—but only when “as many as two Justices decline or are unable to sit.” KY. CONST. § 110(3). The clerk says the Governor is a lawyer and has “remarkable staff,” adding, “they’ll review the pleadings and will put people on who are skilled in that area.” Telephone and E-mail Correspondence with Susan Clary, *supra*. Pleadings aren’t available online, though. “They must request copies,” says the clerk, “and the current governor, unlike previous governors, does,” adding the Governor has always appointed “competent people, not those with agendas.” *Id.*

But what if only one justice can’t participate, a more common scenario than multiple recusals? “[H]ere is where it becomes a bit more tricky,” says the clerk. *Id.* In 1989, the Court, believing it had the inherent power to name a single replacement, adopted a policy under which the Chief Justice would appoint a non-judge lawyer as a special justice. *Ky. Utils. Co. v. S.E. Coal Co.*, 836 S.W.2d 407, 410 app. (Ky. 1992). The court opted for lawyer appointees because of this constitutional provision: “[The Chief Justice] shall assign temporarily any justice or judge of the Commonwealth, active or retired, to sit in any court other than the Supreme Court when he deems such assignment necessary for the prompt disposition of causes.” KY. CONST. § 110(5)(b). The court took this to mean it could appoint lawyers to the Supreme Court. Under the 1989 policy, each justice (elected in districts) would, at the beginning of the Court’s term, provide the Chief Justice a list of at least 10 attorneys from his district, and if recusals arose, the Chief Justice would pick someone from that list. *Ky. Utils.*, 836 S.W.2d at 410 app. Yet the current Court does “not embrace that logic” and chooses to either “go with six or wait out the vacancy.” Telephone and E-mail Correspondence with Susan Clary, *supra*; accord *Hodge v. Commonwealth*, 17 S.W.3d 824 (Ky. 1999) (“[T]he policy set forth in the Appendix to the opinion in *Kentucky Utils. Co. v. South East Coal Co.*, *supra*, has been rescinded.”).

affirms the lower-court judgment. In Maine, for example, a 3–3 split results in this anticlimactic sentence: “Because the Court is evenly divided, we affirm the judgment.”¹⁵⁵ Similarly, the rule in Colorado is that “[w]hen the supreme court acting en banc is equally divided in an opinion, the judgment being appealed will stand affirmed.”¹⁵⁶ Result: oodles of squandered resources—both public and private—but no precedent.

Other states have an impasse-avoiding mechanism at their disposal but elect not to use it—at least not consistently. For example, the Alaska Supreme Court clerk says that, while “a tie goes to the status quo,” the high court itself “sometimes appoints a retired justice as a pro tem in select cases—not as a tiebreaker but on the front end to ensure full strength.”¹⁵⁷ So the court uses a discretionary procedure in “select cases” to avert ties, but not to break them. The Chief Justice has wide latitude to do it differently—for example, to assign someone only after stalemate has arisen. The Alaska Constitution broadly declares: “The chief justice of the supreme court shall be the administrative head of all courts” and “may assign judges from one court or division thereof to another for temporary service.”¹⁵⁸ The Chief Justice *may* assign—it’s discretionary—but doesn’t *have* to, and the current chief justice has opted to appoint only in “select cases,” and only on the front end, not after deadlock occurs. But just what makes cases “select,” and why are they spared the threat and costs of deadlock but not “non-select” cases? The clerk confirms the court uses pro tem justices “in other situations, but I don’t think they’ve ever appointed someone to break a tie.”¹⁵⁹ Why not? “The court doesn’t want someone who is not a sitting justice to be the deciding vote in setting precedent,” says the clerk.¹⁶⁰ But a pro tem justice appointed pre-deadlock is just as surely the deciding, precedent-setting vote if the court ultimately splits 3–2, with the pro tem justice in the majority.¹⁶¹

Interestingly, even when state law can be read to authorize a tiebreaker, a high court may opt for deadlock.¹⁶² In Mississippi, the Constitution states

¹⁵⁵ See *Hale v. Antoniou*, 820 A.2d 586, 586 (Me. 2003).

¹⁵⁶ COLO. APP. R. 35(b).

¹⁵⁷ Telephone and E-mail Correspondence with Marilyn May, Clerk of App. Cts., Alaska Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

¹⁵⁸ ALASKA CONST. art. IV, § 16.

¹⁵⁹ Telephone and E-mail Correspondence with Marilyn May, *supra* note 157.

¹⁶⁰ *Id.*

¹⁶¹ Because pro tem assignments are used haphazardly, not consistently, and never to break ties, I have classified Alaska as following a SCOTUS-like approach.

¹⁶² A generation ago in Illinois, the seven-justice Supreme Court “carefully considered” what to do when, after two justices recused, the court was unable to muster a constitutional majority of four. *Perlman v. First Nat’l Bank of Chi.*, 331 N.E.2d 65, 66 (Ill. 1975) (per curiam). This wasn’t a tiebreaker situation, but it broadly presented a choice between no decision and some decision. The per curiam court concluded it was “preferable” to follow a SCOTUS-like approach. *Id.* Notably, the Chief Justice dissented, stating that although “there is no completely satisfactory means of resolving cases such as

broadly that when any member of the Supreme Court cannot sit, the Governor may commission someone.¹⁶³ But the Chief Justice says his Court's longtime view is that "a tie's a tie," and "we only go to the Governor if we fail to have a quorum," never when the Court is deadlocked.¹⁶⁴ This view, the Chief Justice concedes, "is not without detractors," both on the Court and off, but it's been the consistent practice "as far back as anyone knows or can research."¹⁶⁵

In North Carolina, retired Supreme Court justices may become emergency justices subject to temporary recall to active service, but only to replace a justice who is temporarily incapacitated, not for ordinary recusals or other sporadic vacancies.¹⁶⁶ The clerk says they affirm by an equally divided court about three times a year—"not common but not rare."¹⁶⁷ And the justices "try their darndest not to, using their general persuasive powers."¹⁶⁸ What do the petitioning parties think when the Court locks up? "Not happy."¹⁶⁹

The Rhode Island Supreme Court likewise declines to name a fill-in justice when it divides 2–2. State law authorizes the Chief Justice to temporarily recall a retired high court justice to assist the Court,¹⁷⁰ "but it is not routinely done in those few instances when they are evenly divided," says the clerk.¹⁷¹ In 2009, for example, when the Chief Justice retired, the acting chief justice issued an order recalling his retired colleague until a replacement

this," it was "desirable to utilize a uniform means of resolving all cases in which four members of this court fail to agree." *Id.* at 67 (Underwood, C.J., dissenting). The chief justice insisted that ample authority to overcome deadlock was found in the Illinois Constitution, which reads, "The Supreme Court may assign a Judge temporarily to any court." *Id.* (quoting ILL. CONST. ART. VI, § 16). The chief justice even fleshed out a specific proposal—assigning appellate judges rotationally from a list (to avoid the mischief of strategic selection) and only after deadlock had arisen:

On the infrequent occasions when at least four members of this court are unable to agree, because of the disqualification of one or more of us, I would assign to our court appellate court judges who would sit in place of our disqualified members and only for the purposes of deciding the case in which four of our members could not agree. In order to eliminate any possibility that the result in a given case had been preordained by the selection of a particular judge, I believe our court should select now a list of seven appellate court members and list their names alphabetically, or in the order drawn by chance. Those judges would then be assigned to our court, as the need arose, in rotation.

Id.

¹⁶³ See *supra* note 147; see also MISS. CONST. art 6, § 165.

¹⁶⁴ Telephone Interview with Bill Waller Jr., Chief Just., Miss. Sup. Ct. (Jan. 14, 2016) (on file with author).

¹⁶⁵ *Id.*

¹⁶⁶ N.C. GEN. STAT. §§ 7A-39.3, 7A-39.5 (2019).

¹⁶⁷ Telephone and E-mail Correspondence with Christie Roeder, *supra* note 44.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 8 R.I. GEN. LAWS § 8-3-8(d) (2020).

¹⁷¹ Telephone and E-mail Correspondence with Debra Saunders, *supra* note 151.

chief was named.¹⁷² In 2011, after a subsequent vacancy, the court simply operated with four justices.¹⁷³ The default is affirmance by an equally divided Court.¹⁷⁴ Notably, though, Rhode Island has a rule of appellate procedure that arguably substitutes for a formal tiebreaker, allowing a litigant to move for reargument when the Court is joined by a fifth member.¹⁷⁵

Some state judicial officials say having no tiebreaker heightens judges' willingness to find common ground. The Michigan high-court clerk reports only one tie in fourteen years, calling it "extremely rare" and saying justices "work hard to reason with each other to reach compromise."¹⁷⁶ Collegiality matters enormously, she stresses: "If personal relationships, especially trust and respect, are cultivated among the justices and their staffs, there will be fewer entrenchments that result in tie votes."¹⁷⁷ The Kentucky clerk voiced similar sentiments: "People try to woo and try to convince to avoid 3-3."¹⁷⁸ Yet in Rhode Island, the Chief Justice responded that he can't really say that lacking a formal tiebreaker nudges the Court toward compromise.¹⁷⁹

Another upside, say officials in some no-tiebreaker states, is that working "without a net" provides an opportunity for chief-justice leadership. In Michigan, says the clerk, the Chief Justice wields "ultimate control of the conferences at which opinions are discussed," adding, "if [she] thinks an opinion can be massaged in such a way that it could garner a majority, [she] will continue to bring it back for conference discussion to try to make that happen."¹⁸⁰ In years past, he says, Michigan high-court justices "were more

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See *Meyer v. Meyer*, 68 A.3d 571, 587 (R.I. 2013) ("The court is evenly divided . . . Accordingly, the Family Court judgement is affirmed . . .").

¹⁷⁵ R.I. SUP. CT. R., art. I, r. 25(a) (discussing petitions requesting reargument before the full court "because the Court has evenly divided in an opinion").

For example,

On December 18, 2009, this Court, sitting as a bench of four justices, was evenly divided and thus affirmed the Superior Court's judgment. Morrow moved pursuant to Article I, Rule 25(a) of the Supreme Court Rules of Appellate Procedure to reargue her appeal once this Court was joined by a fifth member. Her request was granted on January 15, 2010 and on September 29, 2010, this Court again heard oral argument. As such, we now decide Morrow's appeal upon its merits.

Cahill v. Morrow, 11 A.3d 82, 86 (R.I. 2011) (internal citation omitted); see also *Ucci v. Mancini*, 387 A.2d 1056, 1057 (R.I. 1978) ("When Mancini's appeal came on to be heard, a four-man court divided equally and affirmed the trial justice's judgment. Later, we granted Mancini's motion to reargue before a full court.") (internal citation omitted).

¹⁷⁶ Telephone and E-mail Correspondence with Larry Royster, Clerk, Mich. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

¹⁷⁷ *Id.*

¹⁷⁸ Telephone and E-mail Correspondence with Susan Clary, *supra* note 154.

¹⁷⁹ Telephone and E-mail Correspondence with Debra Saunders, *supra* note 151.

¹⁸⁰ Telephone and E-mail Correspondence with Larry Royster, *supra* note 176.

entrenched in partisan positions so that was probably more difficult to do,” but today, “the justices are more collegial and seem willing to find common ground.”¹⁸¹ Also, while “Court policy usually allows a new justice to sit on the sidelines for any case in which they did not participate in oral argument,” if it seems the case will deadlock 3–3, “the new justice is strongly encouraged to participate in the decision in order to break the tie.”¹⁸²

Yet the lack of a decision doesn’t always mean the lack of guidance. At SCOTUS, litigants typically get a terse “The judgment is affirmed by an equally divided Court”—nothing more, and ordinarily no indication of how individual justices viewed the case.¹⁸³ Justices are free to express their views but rarely do. For example, Justice Douglas filed a dissenting opinion explaining his merits views in *Biggers v. Tennessee*, a case where the judgment below was affirmed by an equally divided Court because newly appointed Justice Thurgood Marshall was recused.¹⁸⁴

Some state high courts follow this approach, with justices filing competing merits-based opinions in deadlocked cases do. When the Supreme Judicial Court of Massachusetts is evenly split, the justices can still write full opinions explaining why they would affirm or reverse.¹⁸⁵ Pennsylvania also permits dueling writings: “Opinion in Support of Affirmance” vs. “Opinion in Support of Reversal.”¹⁸⁶ To some extent, this mitigates the lack of guidance that otherwise flows from the sterile announcement of an evenly divided court, because if multiple justices join these advisory writings, future litigants can tailor their arguments, having discovered who leans which way and why.

Many state high courts, while opting against tiebreakers, have no qualms about always telling the public how each individual judge voted, whether or not there are reasons. For example, in Iowa, the court issues a short statement—“The court, being equally divided, declares this case affirmed by operation of law”—but the very next sentence lists by name the justices who favored affirmance and reversal.¹⁸⁷ Likewise in Kansas: Deadlock affirms the lower court, but the per curiam opinion lists those who would affirm and reverse.¹⁸⁸ The same is true in Wisconsin.¹⁸⁹

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Supra* notes 12-16 and accompanying text.

¹⁸⁴ 390 U.S. 404, 404-09 (1968) (Douglas, J., dissenting).

¹⁸⁵ *See, e.g.*, *Bransford v. Zoning Bd. of Appeals*, 832 N.E. 2d 639, 640 (Mass. 2005) (listing separate opinions, and the justices who joined them, in a case with an equally divided court).

¹⁸⁶ 210 PA. CODE § 63.4(B)(3) (2020).

¹⁸⁷ *See, e.g.*, *Polk Co. Bd. of Review v. Village Green Co-Op, Inc.*, No. 13-1205, 2014 WL 2619674, at *1 (Iowa June 13, 2014) (per curiam) (citing IOWA CODE § 602.4107 (2013)).

¹⁸⁸ *See, e.g.*, *Thornton v. Shore*, 654 P.2d 475 (1982).

¹⁸⁹ *See, e.g.*, *Sohn Mfg., Inc. v. Lab. & Indus. Rev. Comm’n*, 854 N.W.2d 371 (Wis. 2014).

In sum, seventeen states mirror SCOTUS to some degree, letting the lower-court judgment stand. That leaves thirty-three states with mechanisms to either avoid or break deadlock. The following section surveys and evaluates the various approaches taken in that supermajority of states.

B. Varying Procedures of Varying Prudence: Avoiding and Breaking Legal Logjams in State High Courts

Thirty-five courts take a stab at resolving judicial deadlock.¹⁹⁰

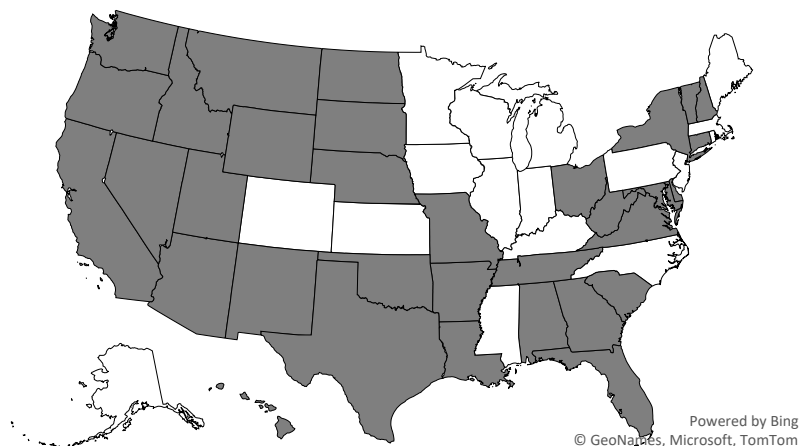


Figure 3: Not Fit to be Tied
35 Courts Avoid or Break Ties

¹⁹⁰ See *infra* Appendix A for summary chart classifying each state's approach.

And as described below, the no-tie procedures in these antistalemate states vary in four fundamental ways:

- *When a temporary justice is appointed, either pre- or post-deadlock:* Twenty-four courts aim to avert ties by appointing a substitute justice as soon as the court finds itself shorthanded. The others wait until a tie actually occurs before naming someone.

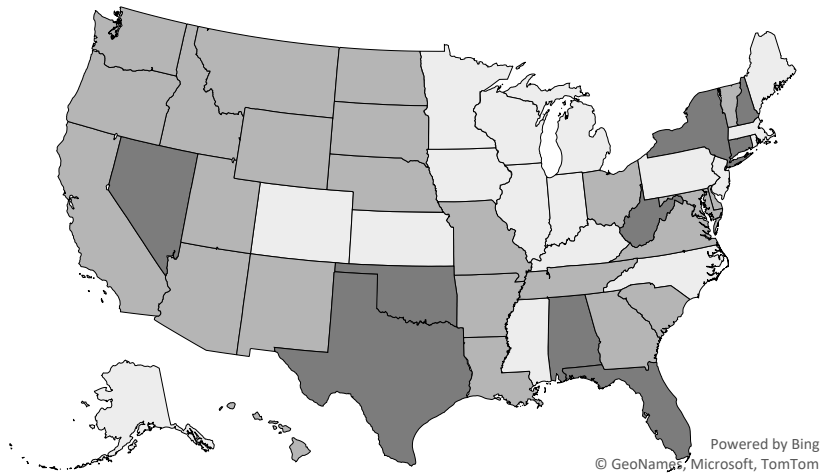


Figure 4: *Timing of Appointments*

Light gray: Pre-deadlock, 24 courts; Dark gray: Post-deadlock, 11 courts

- *Who can be appointed?:* In thirty-two high courts, the fill-in justice must be a jurist; in three courts, nonjudge lawyers can serve too.¹⁹¹

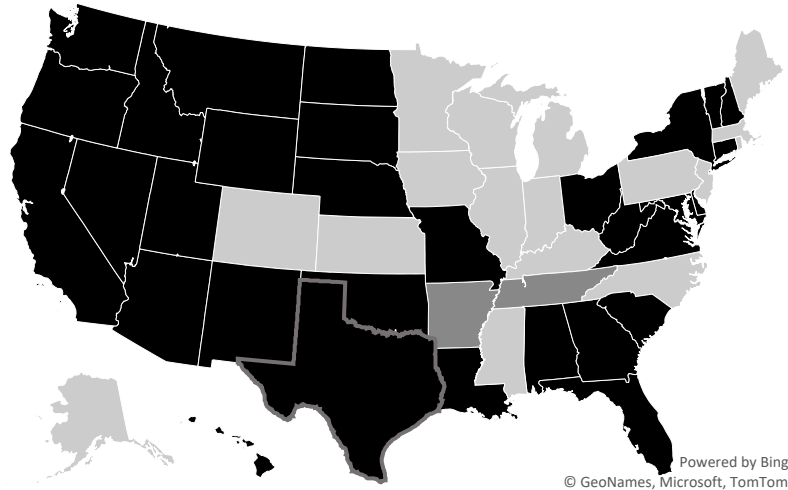


Figure 5: *Who Can Be Appointed?*

Black: judge, 32 courts; Light gray: other, 3 courts

(Others: In Arkansas, the appointee must be a lawyer. In Tennessee, eligible appointees are “men . . . of law knowledge.” In Texas, the civil court appointee must be a judge and the criminal court appointee must be “a person who is learned in the law.”)

¹⁹¹ Classifying Texas and Tennessee is admittedly tricky. In the Lone Star State, fill-in justices on the civil high court (the Supreme Court of Texas) must be lower-court judges while fill-ins on the criminal high court (the Texas Court of Criminal Appeals) may be “a person who is learned in the law.” See *infra* Appendix A. In the Volunteer State, the governor’s appointee must have “law knowledge” while chief justice appointees are assumed to be lower-court judges. See *id.*

- *Who does the appointing?*: In twenty-three courts, the Chief Justice picks the temporary justice; in seven, the Court does so; and in four, the Governor steps in.¹⁹²

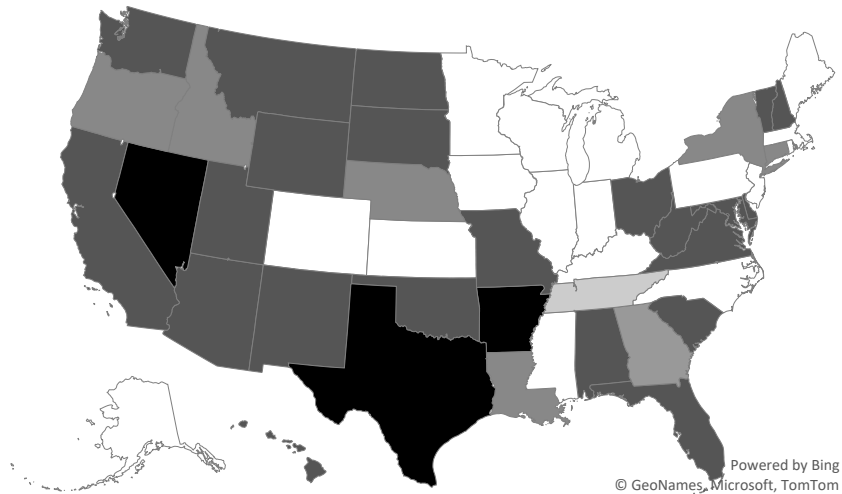


Figure 6: *Who Appoints the Tiebreaking Justice?*

Black: Governor, 4 courts; Dark gray: Chief Justice, 23 courts; Medium gray: Court, 7 courts;
Light gray: shared between Governor and Chief Justice, 1 court

- *How much discretion the appointer has*: Some selection methods are completely randomized, literally the luck of the draw. In Louisiana, the clerk plucks a name from a large Halloween Jack-o'-Lantern. And in Washington State, a name is drawn from a fancy chalice. In other states, the appointer



Figure 7: *The Washington Chalice*



Figure 8: *The Louisiana Jack-o'-Lantern*

¹⁹² See *id.* Caveat: in some of these states, the chief justice or court delegates the actual selection to its administrative staff. Also, Tennessee is counted under both “chief justice” and “governor” since state law divides the assignment power.

wields unchecked discretion, free to pick any qualified person, which can spur cries of cronyism.¹⁹³

Quite simply, the details vary significantly. Some systems are purely ministerial and apolitical, drawing a substitute justice's name at random from among those who are eligible. Others are highly discretionary, where a Chief Justice or a Governor appoints someone—not neutrally, but purposefully.¹⁹⁴ In some states, a pro tem justice is named as soon as the court is operating at less than full strength, sometimes even before a case is granted, meaning the court is naming someone in order to avert a tie, not to break one.¹⁹⁵ In other states, a tiebreaker is commissioned only after the court is hopelessly deadlocked.¹⁹⁶ This section will explore these different methods in greater detail.

This Article categorizes states based on what they actually do, not on what they're authorized to do. For example, the Missouri Constitution says the Supreme Court makes temporary judicial assignments,¹⁹⁷ but “the practice is for the Chief Justice to do it as the court's agent,” says the clerk.¹⁹⁸ Another example: Massachusetts law allows the Chief Justice to temporarily assign retired high court justices, including presumably to break a tie, but the practice is to affirm by an evenly divided court.¹⁹⁹ Same in Minnesota, where the Constitution authorizes temporary assignments, but the Court declines to do so to avoid deadlock.²⁰⁰ This section focuses on courts' actual practice, whether or not that practice accords with the written law.

¹⁹³ States also vary in terms of whether an appointer *must* appoint someone or *may* appoint someone. In twenty-six states, the law uses mandatory, shall-like language, while in ten states, the law uses more permissive, may-like language, giving the appointer discretion whether to appoint a substitute. Some states, like Texas and Tennessee, defy easy classification. Texas, like Oklahoma, has dual high courts, one for civil matters and one for criminal matters. The chief justice of the Texas Supreme Court has discretion whether to notify the governor, who, once notified, must name someone. But the presiding judge of the Texas Court of Criminal Appeals “shall” notify the governor of disqualifications, and the governor “immediately shall” appoint someone. In Tennessee, where appointment power is divided between the governor and the chief justice, the former seems to have a duty to name someone, while the latter seems to have discretion. For full treatment, see *infra* Subsection II.B.2.

¹⁹⁴ See *infra* Subsections II.B.2.a-b.

¹⁹⁵ See *infra* Subsection II.B.1.

¹⁹⁶ See *infra* Subsections II.B.2.a-c (e.g., Texas, New York).

¹⁹⁷ MO. CONST. art. V, § 6.

¹⁹⁸ E-mail Correspondence with Clerk, Mo. Sup. Ct. (Mar. 7, 2016) (on file with author).

¹⁹⁹ See *infra* Appendix A; see also *supra* note 144.

²⁰⁰ Telephone and E-mail Correspondence with Rita DeMeules, *supra* note 149; MINN. CONST. art. VI, § 2 (“As provided by law judges of the court of appeals or of the district court may be assigned temporarily to act as judges of the supreme court upon its request and judges of the district court may be assigned temporarily . . . to act as judges of the court of appeals.”).

1. Roughly Three-Fourths of Anti-stalemate Courts Appoint Fill-in Justices on the Front End, Aiming to Avoid Deadlock in the First Place

Twenty-four states aim to bypass impasse—that is, to avoid ties rather than break them: Arizona, Arkansas, California, Delaware, Georgia, Hawaii, Idaho, Louisiana, Maryland, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.²⁰¹

Here is a sampling of various tie-averting approaches:

Arizona: In Arizona, the Chief Justice routinely appoints a lower-court jurist (“usually a court of appeals judge,” says the clerk) as soon as the court is operating at less than full strength.²⁰² And in Alaska, as discussed above, the Chief Justice will sometimes appoint a retired justice “in select cases”—not to break a tie “but on the front end to ensure full strength.”²⁰³ If no front-end justice is named, and the court later ties, so be it.

Arkansas: In Arkansas, the Governor names a substitute justice “anytime a justice recuses,” says the clerk, and such appointments happen frequently—“maybe 10 percent of cases . . . it’s happening more and more.”²⁰⁴ Today’s Arkansas high court is “divided,” says the clerk, making it “impossible to do anything with six,” so it’s “a time-saver on the front end.”²⁰⁵ The Governor knows the case’s docket number, parties, counsel, and so on.²⁰⁶ But again, these appointments happen early and every time there’s a recusal, not just when a tie happens.²⁰⁷ The clerk cannot recall seeing a repeat appointee, who can be a retired or active jurist or even merely a licensed attorney.²⁰⁸ And if the Governor dawdles, the Lieutenant Governor gets to make the appointment.²⁰⁹

Delaware: Delaware also avoids ties on the front end by only hearing cases at full strength. Under Delaware law, the Chief Justice designates a lower-court judge to be a temporary justice.²¹⁰ The Chief Justice has “lots of discretion,” and this is how he describes his selection process:

²⁰¹ See *infra* Appendix A.

²⁰² Telephone and E-mail Correspondence with Janet Johnson, Clerk, Ariz. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

²⁰³ See *supra* notes 157–161 (discussing Alaska).

²⁰⁴ Telephone and E-mail Correspondence with Stacey Pectol, Clerk of Cts., Ark. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ ARK. CONST., amend. 80, § 13(A).

²¹⁰ DEL. SUP. CT. R. 2(a) 4(a); DEL. CONST. art. IV, §§ 12, 38.

The Chief Justice selects a trial judge after consultation with the presiding judge of whatever trial court it is, solely to ensure that the trial judge is current on her other work.

There was an old written rule that suggested we go to the presiding judges of certain trial courts and then down the line in terms of seniority. That has not been used for years.

No trial judge, of course, sits on an appeal from a colleague on his own court.

To my knowledge, there has never been a controversy about this. But there is a contextual reason for that, which is important to understand. We have a bipartisan judiciary. Every other judge is of the other party by Constitutional mandate. Since 1977, each Governor has employed a bipartisan judicial nominating commission to help select judges, who are nominated by the Governor and confirmed by our Senate. As a result, whatever differences have ever occurred on our Supreme Court have never been partisan in nature. And we go en banc on any case where there is a difference of opinion.

* * *

I have lots of discretion.

But we've had a lot of turnover recently and had to use lots of trial judges.

I have, as have prior CJs, tried to get a variety of trial judges in the mix.

I don't recall ever thinking about political affiliation.

I do think about getting a diverse array of trial judges in the mix, and in some particular cases (complicated business law cases) having judges with experience. That is also true in criminal cases, though. I do always want to make sure the trial judge is current in her work and not burdening colleagues by joining us.

We are a small state. In the past two years, I would bet I have asked 20-30 trial judges at least to serve. Half come from Chancery, the Superior Court, Family Court, and the Court of Common Pleas.

I have actually opened it up a bit, b[y] appointing more Family Court and CCP judges to serve.²¹¹

²¹¹ E-mail Correspondence with Leo Strine, Chief Just., Del. Sup. Ct. (Oct. 26, 2015) (on file with author).

Georgia: A tie vote “has never occurred” in Georgia, says the clerk, because the Court names a substitute pre-argument.²¹² “We rarely operate at less than full strength” and “have never had to appoint someone to break a tie.”²¹³

Idaho: Avoiding ties is also the priority in Idaho, where the Idaho Supreme Court clerk says, “If a justice recuses, I appoint a retired justice to sit so we don’t end up in a tie.”²¹⁴

Missouri: Missouri likewise fills any holes on the front end, before argument, to avoid charges of gamesmanship.²¹⁵ What’s more, while the Constitution’s “wording is the Court does it . . . the practice is for the Chief Justice to do it as the Court’s agent,” explains the clerk:

If the appointment is solely by the chief justice and made only when the court is tied, there will be considerable discussion that the process was manipulated to secure a particular result. If the appointment is earlier in the process, it can be by the chief justice as there is no way to know how the case will turn

²¹² Telephone and E-mail Correspondence with Therese Barnes, Clerk, Ga. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

²¹³ *Id.*

²¹⁴ Telephone and E-mail Correspondence with Stephen Kenyon, Clerk, Idaho Sup. Ct. (Jan. 2016) (on file with author).

²¹⁵ Sometimes efforts to quell substitution-related criticism fall short. In Missouri recently, the Supreme Court issued on the same day conflicting decisions involving wrongful-death claims—one case decided by the court’s seven regular members, the other using a substitute justice. *Compare State ex rel Beisly v. Perigo*, 469 S.W.3d 434, 436 (Mo. 2015) (en banc) (allowing a wrongful death claim to go forward despite the statute of limitations under the doctrine of equitable estoppel) *with Boland v. St. Luke’s Health Sys., Inc.*, 471 S.W.3d 703, 705 (Mo. 2015) (holding, to the contrary, that courts “may not add exceptions to a special statute of limitations”). “The bar was understandably confused,” said the clerk. Telephone and E-mail Correspondence with Clerk, *supra* note 198. A dissenting justice shared the bar’s discomfort:

[T]his Court should not have issued the majority opinion in this case that is contrary to the position taken by a majority of the regular members of this Court in *Boland*, especially as the majority in this case was only possible with the assistance of a special judge from the Court of Appeals, Western District.

* * *

In my view, there is no practical or legitimate reason to issue an opinion in *Beisly* which is in conflict with *Boland* on the same day and that required a special judge to garner a majority. As noted, the proper approach would have been to retransfer, which requires a majority vote of the judges on the case.

Beisly, 469 S.W.3d at 445-46 (Fischer, J., dissenting); *see also* Jeff Lehr, *State’s High Court Provides Latest Twist in Beisly Murder Case: State’s High Court Issues Conflicting Rulings in Beisly, Boland Decisions*, JOPLIN GLOBE (Aug. 22, 2015), http://www.joplinglobe.com/news/local_news/state-s-high-court-provides-latest-twist-in-beisly-murder/article_e34bd8e6-61c2-56bb-8bba-02558a278ab5.html [https://perma.cc/7L96-TU6N] (quoting one lawyer as saying, “the disparity between those two decisions makes following the law in the future impossible”).

out. If the appointment is only after the vote is known, it may be better to have the whole panel or court make the appointment.²¹⁶

Montana: Montana similarly aims for tie avoidance. The seven-member Montana Supreme Court hears most of its cases in five-judge panels.²¹⁷ But when the Court is sitting en banc and there's a temporary vacancy, a district judge is appointed before oral argument.²¹⁸ (Montana has no intermediate appellate court.²¹⁹) "We always have a full complement," says the clerk, and "it's taken care of up front."²²⁰ The Chief Justice appoints with "wide discretion."²²¹ There is "no criteria," but the chief "tries to give everybody a shot."²²² The clerk describes the chief's temp-picking authority as "probably the biggest power a chief justice has" and, with commendable candor, says he favors "the clerk picking on a lottery basis."²²³ Letting the chief pick with boundless discretion—prompting questions like, "Why should someone have two votes?"—invites public qualms.²²⁴ "You want people to have confidence in the court system."²²⁵

Nebraska: The Nebraska Supreme Court likewise names someone "prior to argument," says the clerk, "to avoid a tie, not to break one."²²⁶ The process is "not controlled by rule and is relatively informal."²²⁷ Nor is it "case dependent as to the issues or type of case involved."²²⁸ But it happens fairly often, says the clerk, adding, "We've had some retirements lately."²²⁹ Basically, "[i]f the Chief learns that there will be a vacancy for any reason (conflicts, illness, etc.) the practice is to attempt to fill out all cases with a full Court of seven, even if a full Court is not constitutionally required."²³⁰

²¹⁶ Telephone and E-mail Correspondence with Mo. Clerk, *supra* note 198.

²¹⁷ William P. McLauchlan, *An Empirical Examination of the Business of the Montana Supreme Court*, in OPEN JUDICIAL POLITICS (Rorie Spill Solberg, Jennifer Segal Diascro & Eric Waltenburg eds., 2020), <https://open.oregonstate.edu/open-judicial-politics/chapter/mclauchlan> [<https://perma.cc/JH5G-LE4J>].

²¹⁸ Telephone and E-mail Correspondence with Ed Smith, Clerk, Mont. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

²¹⁹ See McLauchlan, *supra* note 217.

²²⁰ Telephone and E-mail Correspondence with Ed Smith, *supra* note 218.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Telephone and E-mail Correspondence with Teresa Brown, Clerk, Neb. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

New Mexico: A similar tie-avoiding procedure occurs in New Mexico, where the clerk says temporary assignments happen “all the time.”²³¹ There’s “no set or written policy.”²³² “It changes from chief to chief,” who has wide selection discretion and may “focus on subject-matter expertise and geographical variety” or “go back and forth between trial and appellate judges to get variety.”²³³ But appointments have occurred “with frequency the past few years, especially when we get a new justice with lower court experience who has to recuse a lot.”²³⁴ The current Chief Justice is “careful not to be seen as court-packing,” particularly in “cases of political notoriety,” and “might look to a judge of another party to avoid the appearance of slanting the case.”²³⁵ When appointing an appellate judge, the current chief justice has a list “and goes down the list on a seniority basis.”²³⁶ There is no such list for trial-judge appointees.²³⁷

North Dakota: In North Dakota, the Chief Justice (actually, the clerk) names someone “at the first possible moment,” says the clerk, who says swift, pre-deadlock appointments “avoids the suggestion that someone was handpicked due to subject matter.”²³⁸ When the North Dakota Supreme Court is short-staffed, the clerk sends an email to trial court judges outside the district where the case arose. “The first to respond gets it,” says the clerk, adding, “Frankly, we don’t get a lot of responses back because our trial courts are too busy.”²³⁹ And if no trial judge responds, “we then go to senior judges.”²⁴⁰ The prior Chief Justice wanted to approve substitute judges, but “the current chief wants to avoid accusations of political [maneuvering] if there’s a hot topic.”²⁴¹ Such appointments happen frequently—“happens every month,” reports the clerk—since one Justice is married to a trial judge, and another is “married to a big-firm lawyer” whose law firm often appears before the Court.²⁴²

Ohio: Ohio has a front-loaded system, too, explains longtime Chief Justice (and former Lieutenant Governor) Maureen O’Connor.²⁴³ If a 3–3 split arises

231 Telephone and E-mail Correspondence with Joey Moya, Clerk, N.M. Sup. Ct. (October 2015–February 2016) (on file with author).

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.*

238 Telephone and E-mail Correspondence with Penny Miller, Clerk, N.D. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

239 *Id.*

240 *Id.*

241 *Id.*

242 *Id.*

243 Telephone Interview with Maureen O’Connor, Chief Just., Ohio Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

at the “jurisdictional” phase, when the Court is deciding whether to grant a case, she will name a judge from the court of appeals.²⁴⁴ “It’s simple and expeditious,” she says, adding, “My predecessor did it the same way.”²⁴⁵ If the case is granted, Chief Justice O’Connor will designate another appellate judge from around the state.²⁴⁶ Appointments are relatively infrequent, she says: “[T]hree a year would be a lot.”²⁴⁷ She tries to spread appointments “evenly,” doesn’t use brand-new judges, and doesn’t factor in a case’s subject matter.²⁴⁸ “The process is not random, but it is equitable.”²⁴⁹

Oregon: Oregon recently altered its impasse-resolution procedure. Formerly, the Oregon Supreme Court “would not bring on judges at the outset unless it was a death sentence or a case of significant public importance.”²⁵⁰ Today, the court does so “at the beginning of a case if we’re not at full strength,” says the clerk, after review is granted but before argument, adding “we’ll go ahead and appoint regardless of perceived magnitude.”²⁵¹

Utah: The Utah system also aims to avert stalemate on the front end. As soon as the five-member Utah Supreme Court is operating at less than full strength, the Chief Justice “shall call an active judge from an appellate court or the district court.”²⁵² Says the clerk: “We avoid the tie-break scenario altogether by maintaining an odd number . . . for all matters.”²⁵³ The clerk’s office turns to the Presiding Judge of the court of appeals, sends along basic case information, and it’s based on availability—“whoever volunteers first.”²⁵⁴

Vermont: Vermont likewise tries to avoid stalemate by appointing someone early. But the process is “haphazard,” says the clerk’s office, “no guidelines at all”—and also “fairly rare, maybe 4–5 times in 26 years.”²⁵⁵ The relevant statute merely says the Chief Justice may “appoint and assign . . . to a special assignment.”²⁵⁶ And if the court “knows about a recusal ahead of time, it’ll go ahead and appoint to avoid a tie.”²⁵⁷ But if recusal occurs later and the Court

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Telephone and E-mail Correspondence with Lisa Norris-Lampe, Clerk, Ore. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

²⁵¹ *Id.*

²⁵² UTAH CONST., art. VIII, § 2.

²⁵³ Telephone and E-mail Correspondence with Andrea Martinez, Clerk, Utah Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

²⁵⁴ *Id.*

²⁵⁵ Telephone and E-mail Correspondence with Deb Laferriere, Program Adm’r, Vt. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

²⁵⁶ 4 VT. STAT. ANN. tit. 4, § 22.

²⁵⁷ Telephone and E-mail Correspondence with Deb Laferriere, *supra* note 255.

thinks a 2–2 vote is possible, then “an administrative person, not the chief, will pick a retired Supreme Court justice or a sitting superior court judge.”²⁵⁸ The Chief Justice prefers that administrative personnel do the picking—which creates “nervousness” in the clerk’s office when asked who they plan to call “because I know their tendencies.”²⁵⁹ The Court always informs the parties but does not reargue the case.²⁶⁰ The selection process is “convoluted,” says the clerk, who cites a generic “potential for interference” but says selection turns on “factors unrelated to the nature of the case, like who might be available or who’s close by,” adding, “budget may also be a factor because we don’t have to pay a superior court judge.”²⁶¹

Virginia: In Virginia, the Chief Justice designates and assigns retired members of the Virginia Supreme Court—and *only* retired members of the Virginia Supreme Court—“to perform the duties of a justice of the Court.”²⁶² He bases his selection on “whatever reasons he wishes,” says the clerk, who adds that appointments “happen frequently” and “as soon as the Court is less than full strength.”²⁶³ If for some reason a retired member of the Court is unavailable—which is “rare,” according to the clerk—a 3–3 tie affirms the lower-court judgment.²⁶⁴

Also notable is that while various appointment provisions seem to impose certain criteria, appointers sometimes interpret such provisions loosely. For example, in Idaho, the Constitution says the Idaho Supreme Court “may call a district judge,”²⁶⁵ but the clerk says the court reaches outside the district judge pool to use retired Supreme Court justices “for most recusals, with an occasional district judge if needed, primarily because of travel issues.”²⁶⁶ According to the clerk, “each retired justice is budgeted a certain number of days to sit with the Supreme Court. We track their days to make sure we’re staying within our budgeted days for each retired justice, and make the selection based on availability of the justice’s personal calendar.”²⁶⁷

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² VA. CODE ANN. § 17.1-302(B) (2020) (“Any Chief Justice or justice who has retired from active service . . . may be designated and assigned by the Chief Justice of the Supreme Court of Virginia to perform the duties of a justice of the Court.”).

²⁶³ Telephone and E-mail Correspondence with Trish Harrington, Clerk, Va. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

²⁶⁴ *Id.*

²⁶⁵ IDAHO CONST. art. V, § 6.

²⁶⁶ Telephone and E-mail Correspondence with Stephen Kenyon, *supra* note 214.

²⁶⁷ *Id.*

2. Roughly Two-Thirds of Anti-Stalemate States Rely on the Chief Justice to Select Substitute Justices

Broadly speaking, there are three methods for tiebreaking. The first category maximizes judicial discretion; the Chief Justice appoints the fill-in justice. The second is all about executive discretion. In those states, the Governors pick a temporary, replacement jurist. In the third category, the court's administrative personnel handles substitute-justice selection.

a. *Twenty-Three Courts Rely on the Chief Justice*

Almost seventy percent of states with a mechanism to avoid or break ties let the chief justice appoint the replacement justice. In some states, the chief justice's pick isn't really a "pick" at all; rather, appointees are chosen alphabetically, rotationally, or drawn at random from eligible appointees. In other states, the chief justice has unfettered discretion to select whomever he wishes.

i. In Some States, the Chief Justice Selects Neutrally or Randomly

California: The Golden State's system is unique. The Chief Justice has "almost total discretion" in appointing a temporary justice²⁶⁸—whether to appoint, when to appoint, how to appoint, and whom to appoint.²⁶⁹ No procedure is specified, and no consultation is required. The power is unbounded. And because it takes five justices to decide for the seven-member court, the various chief justices have wielded it often. In the quarter century between 1977 and 2003, 408 cases involved a temporarily assigned justice.²⁷⁰ Between 1954 and 1984, a temporary justice cast the deciding vote seventy-three times.²⁷¹

Not only have California's chief justices exercised their power frequently, they have exercised it differently. Chief Justice Rose Bird, for example, handpicked the fill-in justice, a practice that critics say smacked of manipulation to achieve preferred results.²⁷² Sensitive to these charges of

²⁶⁸ Stephen R. Barnett & Daniel L. Rubinfeld, *The Assignment of Temporary Justices in the California Supreme Court*, 17 PAC. L.J. 1045, 1047 (1986).

²⁶⁹ CAL. CONST. art. VI, § 6; see also *Fay v. Dist. Ct.*, 254 P. 896, 899 (Cal. 1927) (holding that this provision confers on the chief justice the power to make temporary assignments to the Supreme Court as well).

²⁷⁰ See James C. Brent, *Stacking the Deck? An Empirical Analysis of Agreement Rates Between Pro Tempore Justices and Chief Justices of California, 1977-2003*, 27 JUST. SYS. J. 14, 21 (2006) (showing that the rate of temporary judge appointments accelerated under Chief Justice Bird's ten-year tenure, with 271 votes cast during that time).

²⁷¹ Barnett & Rubinfeld, *supra* note 268, at 1049.

²⁷² *Id.* at 1183-84 ("This study has found enough evidence of pro-chief-justice bias in the votes, and possibly the selection, of temporary justices sitting with the California Supreme Court to

cherry-picking, her successors, while possessing no less discretion, have adopted an “alphabetical, rotational assignment procedure,” which the clerk described this way: “The Chief Justice assigns in alphabetical order a court of appeals justice with at least one year of experience. If the justice is not able to serve, they will be next in line for the next appointment, and then the process returns to alphabetical order.”²⁷³ The clerk said the Court “always brings in a seventh for oral argument and will bring in a pro tem at the petition phase to break a tie.”²⁷⁴

At the petition for review stage, when “four justices cannot agree on a disposition,” the Chief Justice “assigns in alphabetical order . . . a Court of Appeal justice as a pro tempore justice . . .”²⁷⁵ The pro tem justice must have served on the Court of Appeal for at least one year, and if the justice is unable to serve as pro tem, “the next justice on the alphabetical list will be assigned, and the Court of Appeal justice who was unable to serve will be assigned in the next case in which a pro tempore appointment is required.”²⁷⁶ Here’s what happens if a justice recuses or is otherwise unavailable post-petition:

When it is known after a case is granted but before argument that a justice for any reason is unable to participate in a matter, the Chief Justice pursuant to constitutional authority . . . assigns on an alphabetical rotational basis . . . a Court of Appeal justice to assist the court in place of the nonparticipating justice.²⁷⁷

California, like a few other states, tries to bypass impasse, adding a pro tem justice early in the process, whenever the court is shorthanded, not waiting for deadlock to arise.

Florida: Many states operate their tiebreakers loosely based on custom, tradition, and history, but the Sunshine State has reduced its appointment system to writing. If four justices “cannot ultimately agree to a disposition, the chief justice may in certain cases assign a judge or senior judge to the case as a temporary ‘associate justice’ under the procedures below.”²⁷⁸ The prepositional phrase “in certain cases” is key. In discretionary review cases, a 3-3 tie means “the Court will discharge jurisdiction” (tie goes to the status quo)—except if four justices agree that “extraordinary circumstances exist

conclude that the present system of appointing those justices, a system of virtually unlimited discretion in the chief justice, threatens the reputation and integrity of the court.”)

²⁷³ Telephone and E-mail Correspondence with Frank McGuire, Ct. Admin. & Clerk, Cal. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

²⁷⁴ *Id.*

²⁷⁵ CAL. SUP. CT., INTERNAL OPERATING PRACS. & PROCS. § IV.J.

²⁷⁶ *Id.*

²⁷⁷ *Id.* § XIII.B.

²⁷⁸ FLA. SUP. CT. INTERNAL OPERATING PROC. § X, http://www.floridasupremecourt.org/pub_info/documents/IOPs.pdf [<https://perma.cc/JG6Z-JM3X>].

that would justify deciding the case”²⁷⁹ In mandatory review cases, the Chief Justice (or Acting Chief Justice) will always assign a temporary justice.²⁸⁰ The “Method of Selection” is prescribed in detail:

Associate justices shall be the chief judges of the district courts of appeal selected on a rotating basis from the lowest numbered court to the highest and repeating continuously. A district court shall be temporarily removed from the rotation if the case emanated from it. If more than one associate justice is needed, they shall be selected from separate district courts according to the numerical rotation. If the chief judge of a district court who would be assigned under this procedure is recused from the case or otherwise unavailable, the next most senior judge on that court (excluding senior judges) who is not recused shall replace the chief judge as associate justice.²⁸¹

In sum, the chief judges of the courts of appeal are assigned by numerical rotation.

Hawaii: In the Aloha State, the Constitution gives the Chief Justice wide-open discretion when naming a temporary justice. But “to avoid any appearance of anything,” the Supreme Court of Hawaii has adopted a rotational system, says a lawyer in the Chief Justice’s office.²⁸² The Court maintains a list of trial court judges, and when an appointment is needed, we “go down in order.”²⁸³ The list started off alphabetically, but “names get added to the bottom as new judges are appointed.”²⁸⁴ Moreover, the Court appoints as soon as full strength is lost, even before the case is granted.²⁸⁵ Appointees, though, are only drawn from Oahu, where the Supreme Court is.²⁸⁶ Excluding other islands is “not intentional, but more for financial and logistical reasons.”²⁸⁷

New Hampshire: The Granite State is a rarity, the only one where state law, not merely court custom or internal procedure, requires that substitute justices be selected “on a random basis.”²⁸⁸ The statute specifies who can be appointed, and the order of preference (retired supreme court, retired superior court, active superior court, active district, or probate court). The statute is silent on timing, meaning “there’s discretion on when to appoint,” says the clerk, adding, “there’s no temporary justice in most cases where the

²⁷⁹ *Id.* § X(B).

²⁸⁰ *Id.* § X(C).

²⁸¹ *Id.* § X(D).

²⁸² Telephone and E-mail Correspondence with Public Affairs Office, Hawaii State Judiciary (Oct. 2015-Feb. 2016) (on file with author).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ N.H. REV. STAT. ANN. §490:3 (2020).

Court has three or four.”²⁸⁹ Generally, “a temporary justice is only appointed if needed to meet the quorum requirement of three justices, or if there is a quorum, once the tie presents itself.”²⁹⁰ And when the need arises, says the clerk, “the chief authorizes me to go forward, so we start with retired supreme court justices—we put their names on slips of paper and put them in an envelope.”²⁹¹ Why the statutory randomness requirement? “It was added in 2004 in response to concern that a temporary justice could be assigned to reach a particular result.”²⁹²

New Hampshire’s move toward randomness resulted from an extraordinary crisis: the 2000 impeachment (but not conviction) of Chief Justice David Brock amid accusations he had abused his discretion in making temporary assignments (among other ethical lapses).²⁹³ It was the first impeachment of a Granite State public official since 1790 and arose from a bitter divorce involving one of the Court’s other members—Justice Stephen Thayer.²⁹⁴ The divorce proceedings reached the New Hampshire Supreme Court on an emergency motion filed by Justice Thayer’s wife.²⁹⁵ The upshot of Justice Thayer’s divorce landing in the lap of the Supreme Court was that, naturally, every single justice needed to be recused.²⁹⁶ So Chief Justice Brock was required to appoint replacement judges for the entire bench.²⁹⁷ The Chief Justice announced the replacements at a conference at which Justice Thayer was present, and Justice Thayer vigorously protested one of Justice Brock’s appointees.²⁹⁸ The Chief Justice was then accused of inviting Justice Thayer’s input. Justice Thayer later resigned to avoid criminal misconduct charges stemming from, among other things, his alleged attempt to influence his colleagues’ handling of his case.²⁹⁹

Washington: Washington’s system—names drawn at random from a fancy chalice—seems as ministerial as can be. The names of eligible appointees are “put on separate slips and drawn from a container by the Clerk to ensure that selection is random.”³⁰⁰ Roughly six names are drawn, says the clerk, and “if

²⁸⁹ Telephone and E-mail Correspondence with Eileen Fox, Clerk, N.H. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ David Steelman & John Cerullo, *Judicial Accountability in a Time of Tumult: New Hampshire’s Impeachment Crisis of 2000*, 69 RUTGERS U. L. REV. 1357, 1384-85.

²⁹⁴ *Id.* at 1366, 1384-85.

²⁹⁵ *In re David Brock*, No. JC-00-010A, (N.H. Sup. Ct. Comm. on Judicial Conduct).

²⁹⁶ Steelman & Cerullo, *supra* note 293, at 1384.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 1384-85.

²⁹⁹ *Id.* at 1385-86.

³⁰⁰ WASH. SUP. CT. ADMIN. R. 21(c).

the first declines, we just go to the next.”³⁰¹ The Chief Justice does not “approve” the selection, which “avoids charges of picking people who’ll vote a preferred way.”³⁰² Eligible pro tem appointees include active and retired court of appeals judges. Interestingly, former Washington Supreme Court justices are not eligible (unless the justice had participated in the case before leaving the Court).³⁰³

The Court doesn’t wait for deadlock to arise. If the number of those not participating reduces the nine-member Court to an even number, the default is that “a pro tempore justice shall be appointed by the Chief Justice, unless a majority of the court directs otherwise” but when the Court, though shorthanded, is still operating with an odd number, the Chief notifies the others, “and the majority shall direct whether a pro tempore justice should be appointed.”³⁰⁴

ii. In Other States, the Chief Justice Selects Non-randomly

Oklahoma: Like Texas, Oklahoma has a bifurcated high-court system (the nine-member Oklahoma Supreme Court for civil matters, the five-member Oklahoma Court of Criminal Appeals for criminal matters). Chief Justices of the Supreme Court name substitute judges, not only to their own civil high court but also to the criminal high court.³⁰⁵ Timing-wise, says the clerk, “the situation is assessed after the initial vote is taken on a case by the reduced panel.” If there’s a tie, the Chief Justice will appoint a member of the bench—“the chief can pick whoever he wishes”—either a lower-court judge or a member of the sister high court.³⁰⁶ The clerk says tie-vote situations “hardly ever happen” on the five-member court of criminal appeals, though if they did, the supreme court’s Chief Justice would name someone, quite possibly a supreme court justice, “if the presiding judge of the criminal high court requests it.”³⁰⁷

301 Telephone and E-mail Correspondence with Ron Carpenter, Clerk, Wash. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

302 *Id.*

303 *Id.*

304 WASH. SUP. CT. ADMIN. R. 21(a).

305 In Texas, the dual high courts are constitutional twins, but in Oklahoma, the Supreme Court has general superintending control over the Court of Criminal Appeals. OKLA. CONST. art. VII, § 6.

306 Several years ago, eight of nine Oklahoma Supreme Court justices were recused, and the remaining justice made eight appointments. Telephone and E-mail Correspondence with Michael Richie, Clerk, Okla. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author) (discussing *Musgrove Mill, LLC v. Capitol-Medical Ctr. Improvement & Zoning Comm.*, 2009 OK 19, 210 P.3d 835).

307 Telephone and E-mail Correspondence with Michael Richie, *supra* note 306; *see, e.g.*, Order of Appointment, *Gandy v. Oklahoma*, No. C-2009-720 (Okla. Crim. App. Apr. 20, 2009), <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=appellate&number=2009-720> [<https://perma.cc/HC2N-U4AJ>] (Vice Chief Justice Steven Taylor assigned to sit on the Court of Criminal Appeals due to the retirement of a judge).

South Carolina: The practice in South Carolina is multi-layered, and the timing of appointments “depends on what we’re dealing with,” explains the clerk.³⁰⁸ “For routine motions or petitions that will be decided without oral argument, the Court will determine that it is deadlocked before appointing a substitute.”³⁰⁹ But for cases set for oral argument, “a substitute will be appointed well before the argument is commenced.”³¹⁰ The Chief Justice may appoint a “retired judge or justice from the Supreme Court or court of appeals,”³¹¹ but the clerk says using retired high-court justices has proven “very effective” and that using court of appeals judges “disrupts the schedules of those courts.”³¹² The Chief Justice has unfettered discretion, but the clerk reports no criticisms of strategic selection. “It usually turns on who’s available and close by.”³¹³

South Dakota: The state constitution gives the Chief Justice “power to assign any circuit judge to sit . . . on the Supreme Court in case of a vacancy or in place of a justice who is disqualified or unable to act.”³¹⁴ The five-member high court has no discretionary review, and the clerk says appointments happen regularly and as soon as the Court is operating at less than full strength. How does it work? The clerk is unsure, calling it “random,” saying “word comes down from the chief who he has selected.”³¹⁵

Virginia: The Chief Justice assigns retired members of the Supreme Court and has freewheeling discretion to pick for “whatever reasons he wishes,” says the clerk.³¹⁶ Appointments are frequent and occur up front, whenever the Court dips below full strength.³¹⁷ And in the rare event a retired supreme court justice is unavailable, a 3–3 split affirms the lower court.³¹⁸

West Virginia: In the Mountain State, the Chief Justice has “absolute discretion” says the clerk, “but decisions are often made collaboratively.”³¹⁹ While selection “isn’t random,” the inquiry is more, “Who would be good on this case and hasn’t been up here before?”³²⁰ And because the chief justiceship rotates every year in West Virginia, “responsibility isn’t lodged in someone

³⁰⁸ Telephone and E-mail Correspondence with Dan Shearouse, Clerk, S.C. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ S.C. CODE ANN. § 14-1-215.

³¹² Telephone and E-mail Correspondence with Dan Shearouse, *supra* note 308.

³¹³ *Id.*

³¹⁴ S.D. CONST. art. 5, § 11.

³¹⁵ Telephone and E-mail Correspondence with Laura Graves, Clerk, S.D. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

³¹⁶ Telephone and E-mail Correspondence with Trish Harrington, *supra* note 263.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Telephone and E-mail Correspondence with Rory Perry, Clerk, W. Va. Sup. Ct. App. (Oct. 2015-Feb. 2016) (on file with author).

³²⁰ *Id.*

permanently, which fosters goodwill people not wanting to spoil the well.”³²¹ Appointments happen “when we reach a critical stage of the proceedings,” says the clerk, specifically “once the Court has voted and a tie vote presents itself for the first time.”³²² The Court gets a “good read” on votes at the Decision Conference, which occurs pre-argument in every case.³²³ Again, the Chief Justice has “wide discretion” but is “good about keeping those appointments as neutral and fair-minded as possible, and spreading work” among the seventy to eighty jurists who are in the eligible pool.³²⁴

Interim appointments in West Virginia weren’t always so noncontroversial. In 2000, when the West Virginia Supreme Court frequently split 3–2, a prominent West Virginia lawyer lamented the Chief Justice’s “vast discretion (comparable, say, to that of an Oriental potentate),” able to dole out appointments “to those who were personally or ideologically simpatico.”³²⁵ Citing the scandal then engulfing the similar appointment system in New Hampshire, the lawyer decried the arbitrariness and risk of abuse: “Not infrequently, it is the substitute justices, voting with the chief, who constitute the majority. Thus, under this rule, as a de facto matter the Chief Justice is given a second, and occasionally a third, vote.”³²⁶ The lawyer predicted, “A New Hampshire-style wreck is just waiting to happen.” The issue isn’t, he continued, whether the Chief Justice actually stacked the deck, but whether a reasonably prudent person might think so.³²⁷ A better system, he proposed, would be to simply put the names of eligible judges in a proverbial hat and draw one. Unfettered discretion enables “backroom politics[] that never sees the light of day” and risks “the crassest of cronyism,” he contended. “More sinister, it can be part of a scheme to influence the result,”³²⁸ noting a report that “a chief justice in years past would call prospective appointees and pose ‘hypothetical’ questions.”³²⁹

Wyoming: The current Wyoming Supreme Court makes frequent use of temporary justices. “It happens quite often,” says the clerk.³³⁰ It’s a five-member court with no discretionary review, and the newest member was a

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ John Rogers, *Appointment of Substitute Judges: The Proverbial Train Wreck Looking for a Place to Happen*, W. VA. LAW., Oct. 2000, at 14.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ Telephone and E-mail Correspondence with Carol Thompson, Clerk, Wyo. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

22-year trial court judge in a district with a prison.³³¹ Translation: He recuses a lot. And while the Constitution says the Chief Justice “may appoint,” the current chief (an office that rotates every four years) treats it as “shall appoint.”³³² Geographically, chiefs “try to move it around,” says the clerk, adding, “It’s done on the front end before anything happens.”³³³ The clerk’s office is uninvolved.³³⁴ The Chief Justice picks a list of 23 trial court judges and one former Supreme Court justice.³³⁵ The Chief Justice says, “chiefs have probably done it differently over the years,” but his practice is to send an email to trial judges and “ask if they want to take a turn.”³³⁶ He tries to go through that list and says he has never tried to pick “selectively,” noting that “[s]ome cases are more significant than others, thus you’d want a more seasoned judge to participate.”³³⁷ Also, “weather is a real issue, so you try to get judges from different parts of the state during times of the year when it’s easier to travel.”³³⁸ And when the chief himself is recused, the most senior justice picks “and always picks the retired Supreme Court justice.”³³⁹

b. *Four Courts Rely on the Governor*

Four states involve the Governor in selecting the tiebreaking justice: Arkansas, Nevada, Tennessee, and Texas.³⁴⁰

Arkansas: As noted above, the Governor names a substitute in “maybe 10 percent of cases.” He does so on the front end, says the clerk, which saves time given the current division on the high court.³⁴¹ The Governor knows the

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*; see also Telephone and E-mail Correspondence with E. James Burke, Chief Justice, Wy. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

³³⁶ Telephone and E-mail Correspondence with E. James Burke, *supra* note 335.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ I do not count Alabama among the governor-picks group. True, a statute says the governor will name a temporary, tiebreaking justice when “there is equal division among [the judges] on any question material to the determination of the case.” ALA. CODE § 12-2-14. But the nine-member Alabama Supreme Court considers that law unconstitutional on separation of powers grounds. See *City of Bessemer v. McClain*, 957 So. 2d 1061, 1093-95 (Ala. 2006) (holding that § 12-2-14 is unconstitutional insofar as it limits the chief justice’s right to fill a court vacancy). The court considers the chief justice head of the judicial branch of government, and the Chief Justice appoints someone whenever the court is stymied, “typically a retired former justice,” says court staff. Telephone and E-mail Correspondence with Brad Medaris, Cent. Staff Att’y, Ala. Sup. Ct. (Dec. 2015) (on file with author). But the chief has “wide-open discretion” and could draw from a wider judicial pool. *Id.*

³⁴¹ Telephone and E-mail Correspondence with Stacey Pectol, *supra* note 204.

case specifics when he makes the assignment, but again, it happens early on, before stalemate has arisen.³⁴²

Nevada: The Silver State bifurcates the power to name temporary justices. In other words, the power to unlock a divided court is itself divided—or rather, shared between the Governor and the Chief Justice. Once the Nevada Supreme Court votes and a tie arises, the Governor may designate a lower-court judge.³⁴³ But in practice the selection is made by the Chief Justice, who draws a name at random from index cards—a “high-tech process,” says the clerk.³⁴⁴ A letter then goes to the Governor asking him to appoint whoever was drawn.³⁴⁵ “It’s courtesy that the governor defers to the Court’s request,” the clerk says.³⁴⁶ “If the appointee is a district judge, the governor makes the appointment,” deferring to whatever name the Chief Justice drew at random.³⁴⁷ But “if the appointee is a senior (i.e., retired) justice, the Chief Justice picks whoever he wants unilaterally, and the governor has no involvement.”³⁴⁸ Nevada “only recently got a court of appeals,” but the clerk suspects it would work the same as district judges—the Governor rubber-stamping the Chief Justice’s random, index-card selection.³⁴⁹

Tennessee: In 2014, the Volunteer State amended its Constitution to adopt the “Tennessee Plan” for choosing appellate judges: Governor appoints, Legislature confirms, voters retain.³⁵⁰ As for filling temporary vacancies, things are a bit complicated, as authority is not vested solely in one branch.

³⁴² *Id.*

³⁴³ NEV. CONST. art. 6, § 4 (“In case of the disability or disqualification, for any cause, of a justice of the Supreme Court, the Governor may designate a judge of the court of appeals or a district judge to sit in the place of the disqualified or disabled justice.”); NEV. REV. STAT. § 1.225(5) (2019) (“Upon the disqualification of: . . . A justice of the Supreme Court . . . a judge of the Court of Appeals or a district judge shall be designated to sit in place of the justice as provided in Section 4 of Article 6 of the Constitution”); NEV. R. APP. P. 25A(b)(2)(C) (“A senior justice, senior Court of Appeals Judge, or active district court judge may be assigned to sit in place of a justice as provided by law.”); *see also* NEV. SUP. CT. R. 10(8) (“The temporary assignment of a senior justice . . . to the supreme court . . . shall be made by order signed by the chief justice or the chief justice’s designee and filed with the clerk of the supreme court.”)

³⁴⁴ Telephone and E-mail Correspondence with Tracie Lindeman, Clerk, Nev. Sup. Ct. (Oct. 2015-Feb. 2016).

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*; *see* NEV. SUP. CT. R. 10(8).

³⁵⁰ TENN. CONST. art. VI, § 3. The 2014 amendment scrapped the Judicial Nominating Commission and added confirmation by the General Assembly. *See* Alexandra Martellaro, *All 4 Tenn. Constitutional Amendments Pass*, RENO GAZETTE J. (Nov. 4, 2014, 8:35 PM), <https://www.rgj.com/story/news/politics/2014/11/04/november-election-tennessee-amendments/18489923> [<https://perma.cc/AJ5C-AT23>] (reporting on a voter-passed amendment that changed the way judges are appointed in the state).

The Tennessee Constitution gives appointment power to the Governor,³⁵¹ but the very next sentence authorizes the Legislature to pass laws for the appointment of “special Judges” if someone is “unable . . . to attend or sit” or is “incompetent.”³⁵² And lawmakers have done just that, passing statutes that confer power on the Chief Justice to appoint replacement judges.³⁵³ The Tennessee Supreme Court put it this way in a 1999 case challenging the Chief Justice’s power to name special supreme court justices: “We believe that [these various statutes] were promulgated with the intent to empower both the Governor and the Chief Justice to designate temporary judges.”³⁵⁴ Such temporary appointments, however, are exceedingly rare, says the Court clerk.³⁵⁵ And if a 2–2 deadlock results from a vacancy, rather than a recusal, the Court agrees to hold the case until the permanent justice is named.³⁵⁶

Texas: The Lone Star State uses the uncommon—and in my view, alarming—method described at the beginning of this Article. That is, the Governor—the head of a separate branch of government—selects the tiebreaking justice and does so with full knowledge of which case is deadlocked and what the disputed issues are. He does not know which justices have voted which way, but he knows the case is tied and that his appointee will cast the tiebreaking vote. Texas law doesn’t require the case to be revealed.³⁵⁷ The disclosure is simply a matter of longstanding tradition. Unsurprisingly, no other state with a “governor-picks” designation system thinks it a good idea to reveal which case is tied.

In recent history, the Texas Supreme Court has used judicial pinch-hitters sparingly—only fourteen cases in the past quarter-century. Nine of these

³⁵¹ TENN. CONST. art. VI, § 11 (“In case all or any of the judges of the Supreme Court shall thus be disqualified . . . the governor of the state . . . shall forthwith specially commission the requisite number of men, of law knowledge, for the trial and determination thereof.”). Twenty years ago, the governor exercised his constitutional power to name replacements for the entire court when they all recused themselves in a case challenging the way justices are elected. *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331, 335 (Tenn. 1996).

³⁵² TENN. CONST. art. VI, § 11 (“The Legislature may by general laws make provision that special judges may be appointed, to hold any courts the judge of which shall be unable or fail to attend or sit; or to hear any cause in which the judge may be incompetent.”).

³⁵³ TENN. CODE ANN. §§ 17-2-102 (giving the Governor the power to fill vacancies if a judge is “incompetent to sit”), 17-2-104 (same if a judge falls ill), and 17-2-110(a) (2019) (giving the Chief Justice the power to fill vacancies when a judge is “unable to try the docket”).

³⁵⁴ *Hooker v. Sundquist*, 1999 WL 74545 at *2-3 (Tenn. Feb. 16, 1999) (“We interpret the reference to “appellate judge[s]” in TENN. CODE ANN. § 17-2-110(a) to include judges of the Supreme Court.”).

³⁵⁵ Telephone and E-mail Correspondence with James M. Hivner, Clerk, Tenn. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

³⁵⁶ *Id.*

³⁵⁷ See *infra* Section IV.D; see also TEX. GOV’T CODE ANN. § 22.005 (West 2020) (giving the governor the power to appoint justices in the event of a vacancy without requiring the Chief Justice to reveal the specifics of the case).

occasions arose during fifteen-year tenure of Governor Rick Perry (2000–2015),³⁵⁸ up from four during the five-year tenure of Governor George W. Bush (1995–2000),³⁵⁹ up from one during the combined eight-year tenure of Governor Bill Clements (1979–1983; 1987–1991).³⁶⁰

Unlike the twenty-four other states where a temporary justice is named as soon as the court is operating at less than full strength, the Texas Supreme Court usually doesn't request a substitute justice unless the court is hopelessly deadlocked post-argument. Some Texas high court justices report a general reluctance to involve the Governor unless inescapably necessary, a view plausibly understood as fostering greater openness and deference to the views of colleagues (similar to how some SCOTUS Justices are reportedly more "accommodating" in order to avoid a 4–4 split given the lack of any tiebreaker).

One point merits mention: It would be mistaken to describe all of the Texas substitute appointees as "tiebreaking" justices. For example, in one case, *In re George*,³⁶¹ as a letter from then Chief Justice Phillips to then Governor Bush makes clear, three justices were recused, meaning the Court was markedly short-handed; they had to decide the case with only six justices, making the five-vote majority "needed to render judgment" tougher to reach.³⁶² But the tie-vote impasse was obvious in other cases, as well. For example, in *In re Masonite Corp.*,³⁶³ Chief Justice Phillips's letter frankly states, "[w]ith eight justice[s] participating, five justices have not been able to agree on the proper disposition."³⁶⁴ Same with *In re Epic Holdings*,³⁶⁵ where, with

³⁵⁸ The cases during Governor Perry's tenure include: *DiGiuseppe v. Lawler*, 269 S.W.3d 588 (Tex. 2008); *Igal v. Brightstar Info. Tech. Grp. Inc.*, 250 S.W.3d 78 (Tex. 2008); *In re BP Prods. N. Am., Inc.*, 244 S.W.3d 840 (Tex. 2008); *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1 (Tex. 2008); *Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190 (Tex. 2007); *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743 (Tex. 2006); *Sultan v. Mathew*, 178 S.W.3d 747 (Tex. 2005); *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513 (Tex. 2002); *In re TXU Elec. Co.*, 67 S.W.3d 130 (Tex. 2001).

³⁵⁹ *In re George*, 28 S.W.3d 511 (Tex. 2000); *In re Masonite Corp.*, 997 S.W.2d 194 (Tex. 1999); *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998); *In re EPIC Holdings, Inc.*, 985 S.W.2d 41 (Tex. 1998).

³⁶⁰ *Hous. Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784 (Tex. 1988).

³⁶¹ 28 S.W.3d 511.

³⁶² *Collins v. Ison-Newsome*, 73 S.W.3d 178, 183 (Tex. 2001) (holding that a minimum of five justices is needed to render judgement); see also Letter from Thomas R. Phillips, Chief Just., Tex. Sup. Ct., regarding *In re EPIC Holdings*, to George W. Bush, Governor, Tex. (Jan. 4, 2000) (on file with the Texas Supreme Court).

Two historical tidbits. First, some of the letters from Governor Bush announcing his appointment of tiebreaking justices were sent to then Secretary of State Alberto Gonzales, who served in that role after his stint as Governor Bush's first general counsel and before serving on the Texas Supreme Court. Second, in *In re George*, Alberto Gonzales was himself one of the recused justices and later became President George W. Bush's White House Counsel and then U.S. Attorney General.

³⁶³ 997 S.W.2d 194 (Tex. 1999).

³⁶⁴ Letter from Thomas R. Phillips to George W. Bush, *supra* note 362.

³⁶⁵ 985 S.W.2d 41 (Tex. 1998).

two recusals, “five justices have not been able to agree on the proper disposition.”³⁶⁶ As these letters demonstrate, temporary justices are needed whenever the Court is unable to reach a five-vote majority, whether or not that corresponds to a 4–4 tie.

While infrequent, deadlock does arise in the Lone Star State, and when it does, the Governor appoints a replacement justice.³⁶⁷ When the Texas Supreme Court, the civil high court, is operating at less than full strength, the Chief Justice *may*, but isn’t required to, “certify to the governor,” who “immediately shall commission the requisite number of persons who are active appellate or district court justices or judges and who possess the qualifications prescribed for justices of the supreme court to try and determine the case.”³⁶⁸

Notably, the Texas Supreme Court’s substitute-justice law changed in 1995 in three key ways.³⁶⁹ First, the prior law was phrased in mandatory terms, stating, “[t]he chief justice shall certify to the governor” The new law gives the Chief Justice discretion.³⁷⁰ Second, the prior law envisioned two scenarios justifying a special appointment: lack of a quorum and equal division.³⁷¹ The new law scrapped the deadlock requirement, meaning the Chief Justice may request substitute justices whenever someone is unable to participate³⁷²—for example, if multiple recusals leave the Court short-staffed, as happened in *In re George*, when three temporary justices were commissioned.³⁷³ Third, the prior law didn’t require appointment of a sitting judge, stating only that the appointee must “possess the qualifications prescribed for justices of the supreme court[.]”³⁷⁴ The new law says appointees must be “active appellate or district court justices or judges” who are themselves constitutionally eligible to sit on the Supreme Court.³⁷⁵

These tweaks aside, the gamesmanship persists. Unsurprisingly, and presumably, Governors will appoint temporary justices whose general judicial philosophy tracks their own. And while a Governor cannot foretell his permanent appointees’ behavior spanning thousands of cases in a judicial

³⁶⁶ Letter from Thomas R. Phillips to George W. Bush, *supra* note 362.

³⁶⁷ TEX. CONST. art. V, § 11; TEX. GOV’T CODE ANN. § 22.005 (West 2019).

³⁶⁸ § 22.005(a)-(b).

³⁶⁹ Act of May 19, 1995, ch. 428, § 1, 1995 Tex. Gen. Laws 3097, 3097 (codified as amended at TEX. GOV’T CODE ANN. § 22.005 (West 2019)).

³⁷⁰ *Id.* (“The chief justice may . . .”).

³⁷¹ *Id.* (allowing a vacancy to be filled only when “at least five members of the supreme court are disqualified . . . or the justices of the court are equally divided”).

³⁷² *Id.* (allowing a vacancy to be filled whenever “one or more justices of the supreme court have recused themselves . . . or are disqualified”).

³⁷³ 28 S.W.3d 511 (Tex. 2000).

³⁷⁴ § 1, 1995 Tex. Gen. Laws 3097, 3097.

³⁷⁵ *Id.* See TEX. GOV’T CODE ANN. § 22.005 (West 2019) for the current version in its entirety.

career, the dynamics are different when the Governor is appointing a tiebreaking justice for a single, specific case.³⁷⁶

c. *Seven Courts Rely on Court Administration*

Seven states let the court collectively select a tiebreaking justice. Here, too, the specifics vary from state to state. And as with chief justice appointments, many courts delegate the selection to administrative personnel at the court.

Connecticut: Connecticut uses an uncommon method of impasse resolution. The seven-member Connecticut Supreme Court often hears cases in five-justice panels, but what happens if a justice recuses, and the four remaining justices split 2–2? Statute and court rule both state, “Whenever the court is evenly divided as to the result, the court shall reconsider the case, with or without oral argument, with an odd number of judges.”³⁷⁷ Who gets added and how? The 1998 case *Pesino v. Atlantic Bank of New York* is instructive.³⁷⁸ A justice recused post-argument, so another member of the court was added to the panel (the mechanics of which sparked some disagreement).³⁷⁹ When adding to a panel, the Supreme Court first looks to its seven active members and then to retired members. If a panel can’t be constituted from active and retired members of the court, a lower-court judge may be summoned, and that selection, the clerk says, is “completely based on seniority.”³⁸⁰

Georgia: Georgia law gives appointment power to “the remaining Justices,”³⁸¹ and the mechanics are unique. The clerk has exclusive access to the “designated judge list,” a spreadsheet of names of lower-court judges submitted by all seven members of the court. “I’m the only person who knows who’s up next,” says the clerk, “so there’s no appearance of cherry-picking. It’s all randomized.”³⁸² Names are selected “in alternating order,

³⁷⁶ For an examination of the fourteen cases in which substitute justices were appointed in the past quarter century, see *infra* Appendix B.

³⁷⁷ CONN. GEN. STAT. § 51-209; CONN. R. APP P. § 70-6; see also CONN. GEN. STAT. § 51-207 (permitting the Chief Justice to summon a Superior Court or Appellate Court judge to temporarily sit in for a Supreme Court judge who is unavailable or disqualified).

³⁷⁸ 709 A.2d 540, 542-43 (Conn. 1998) (providing an example in which a justice who was added to an evenly divided panel participated in the decision after reviewing briefs and listening to a recording of the oral argument).

³⁷⁹ See *id.* at 548 n.1 (McDonald, J., dissenting) (arguing the case should have been reargued).

³⁸⁰ Telephone and E-mail Correspondence with Pamela Meotti, Chief Admin. Officer, Conn. Sup. Ct. (Oct. 2015) (on file with author).

³⁸¹ GA. CONST. art. VI, § 6, para. 1 (“If a Justice is disqualified in any case, a substitute judge may be designated by the remaining Justices to serve.”); GA. CODE ANN. § 15-2-2 (“Whenever one or more of the Justices of the Supreme Court are unable . . . to preside in any case and the parties desire a full bench, it shall be the duty of the remaining Justices to designate a [trial] judge . . . to preside in the place of the absent Justice or Justices . . .”).

³⁸² Telephone and E-mail Correspondence with Therese Barnes, *supra* note 212.

giving each justice the opportunity to extend an invitation.”³⁸³ This neutral process has long been followed, though Justice David Nahmias, a former law clerk to Justice Scalia, has “tightened things up” to ensure “randomness and no influence.”³⁸⁴

Idaho: Appointments are discretionary and may factor in subject-matter expertise. And while the Idaho Constitution vests authority in the court collectively, the selection is delegated to the clerk. “In most cases, I select the pro tem justice without input from the court,” the clerk says. “I discuss with the Chief Justice who to select in about 10 percent of the cases. Most of these discussions occur when the Court will be traveling for hearings, and I need to find a local district judge to sit with the Court.”³⁸⁵

Louisiana: Befitting Louisiana’s quirky, fun-loving vibe—*laissez les bons temps rouler*—the names of lower-court judges eligible for appointment are written on small circular discs (like those attached to your car keys at a valet stand) and thrown into a plastic Halloween Jack-o’-Lantern.³⁸⁶ The clerk reaches in and plucks one. Actually, the clerk plucks three, “keeping in mind the order of their selection,” says the clerk. If all three decline, “three more names are pulled and the process continues until a judge accepts.”³⁸⁷

The court uses “ad hocs” both when determining its docket and when deciding its docket. “When considering whether to grant or deny a writ, we appoint if it’s a 3–3 tie,” says the clerk.³⁸⁸ But when the court sits to hear a granted case, “we have a total of seven participate, filling any vacancies with ad hocs prior to sitting.”³⁸⁹ The court will tell the clerk it needs a seventh justice, and the clerk will take it from there. “The Court signs the order of appointment but is removed from the decision of who will sit,” says the clerk, who offers this advice for states: “Have a pre-selected pool of potential appointees so that the appointment can be random without a perception of manipulation for a desired result.”³⁹⁰

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ Telephone and E-mail Correspondence with Stephen Kenyon, *supra* note 214.

³⁸⁶ Telephone and E-mail Correspondence with John Olivier, Clerk, La. Sup. Ct. (Oct. 2015–Jan. 2016) (on file with author). Louisiana’s Constitution gives its Supreme Court general supervisory jurisdiction over all other courts and authority to establish procedural and administrative rules not in conflict with law and to assign a sitting or retired judge to any court. LA. CONST. art. V, § 5.

³⁸⁷ Telephone and E-mail Correspondence with John Olivier, *supra* note 386.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.* Not all lower-court judges’ names go into Louisiana’s Jack-o’-Lantern. There is a preapproved list, and Supreme Court justices have discretion to remove certain jurists from consideration. So only “eligible” judges are potential appointees. *Id.*

Nebraska: Since 1991, the process has worked this way: The Chief Justice's administrative assistant calls the chief judge of the court of appeals, who seeks a member of that court to sit on the Supreme Court. "The Chief Justice is not involved in that process within the Court of Appeals. We are fairly certain that the Court of Appeals selection is on a rotational basis."³⁹¹

New York: The Empire State has "no set rule in place," says the clerk.³⁹² The Constitution authorizes the high court to designate a trial court judge in times of "temporary absence or inability to act," and the court only does so when it is hopelessly deadlocked.³⁹³ Interestingly, the court only names a temporary justice if the 3–3 tie is due to recusal, not if it's due to a vacancy (which doesn't fit within what the Constitution calls a "temporary absence or inability to act").³⁹⁴ If the former, "someone can vouch in"; if the latter, "the Court might reargue."³⁹⁵ Appointments are made by the court, "under leadership of the chief judge," says the clerk, adding, "They spread it around, but beyond that, I can't be more specific."³⁹⁶

Oregon: The pool of appointees varies depending on the type of case. "In non-capital cases, we select from the court of appeals," says the clerk.³⁹⁷ "We have a list by seniority and just go down the list. It's rotational."³⁹⁸ In "death cases," however, "we tend to pull from retired Supreme Court justices."³⁹⁹ And if the court still winds up 3–3—"we may end up with six even if we didn't start with six"—"we'll probably affirm by an equally divided Court," says the clerk, though if it's a mandatory-appeal case, "we might evaluate our options and work hard to avoid a tie."⁴⁰⁰ When asked why the court switched procedures, which the court has used "probably three times so far," the clerk replied, "It avoids the danger of six so you know you have seven going in. And pulling a court of appeals judge just means walking across the alley."⁴⁰¹

³⁹¹ Telephone and E-mail Correspondence with Teresa Brown, *supra* note 226.

³⁹² Telephone and E-mail Correspondence with Andrew Klein, Clerk, N.Y. Ct. App. (Oct. 2015-Feb. 2016) (on file with author).

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ Telephone and E-mail Correspondence with Lisa Norris-Lampe, *supra* note 250.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

III. YOU CAN'T PLEASE EVERYBODY: DRAWBACKS TO STATES' DIVERGENT TIEBREAKING APPROACHES

Naturally, the various tiebreaking systems have naysayers. As the Illinois Supreme Court put it a generation ago, “No solution is wholly free from objection.”⁴⁰² No matter how a state deals with impasse, there is no shortage of deadlock dramas in state high courts. This section will highlight examples of the heartburn that may result when (1) there is no tiebreaker, (2) the high court collectively selects someone, (3) the Chief Justice picks a replacement justice, or (4) the Governor chooses.

A. *Angst When There Is No Tiebreaker—Pennsylvania and Wisconsin*

At full strength, the Pennsylvania Supreme Court is a septet—but it spent nearly all of 1995 as a sextet. Shorthanded, the six-justice court deadlocked 3–3 in several cases. One case concerned a couple trying to adopt a sickly toddler they had nurtured since infancy. Another involved a company trying to stop union organizing at one of its stores. A third case concerned a criminal defendant seeking to overturn a drug conviction and long prison term. As at the U.S. Supreme Court, a tie vote on the Pennsylvania high court means the lower-court judgment stands.⁴⁰³ Said one Philadelphia lawyer: “Those 3–3 splits are so disheartening. It’s such a long journey just to get there in the first place, and to lose because of a missing justice is devastating.”⁴⁰⁴ Said another: “A 3–3 vote is like kissing your sister. You don’t get anywhere, and the state of the law is not advanced at all.”⁴⁰⁵ A former member of the court added, “The state’s highest court should be in a position, at all times, to make definitive decisions on the laws of the land.”⁴⁰⁶

A few years ago, the Wisconsin Supreme Court justices deadlocked 3–3 over whether their colleague’s 2008 campaign ad violated judicial ethics rules. The impasse left everyone befuddled, though the accused justice declared victory, saying the stalemate meant the state had failed to satisfy its burden. A former member of the court confessed, “It’s an anomaly and I don’t know of anything like it. I don’t have the foggiest idea of where they go next.”⁴⁰⁷

⁴⁰² *Perlman v. First Nat’l Bank of Chi.*, 331 N.E.2d 65, 66 (Ill. 1975) (per curiam).

⁴⁰³ See *infra* Appendix A.

⁴⁰⁴ Larry King, *Some Want Full House in High Court*, PHILA. INQUIRER, Sept. 7, 1996, at A1.

⁴⁰⁵ *Id.* at A10.

⁴⁰⁶ *Id.* (quoting former Pennsylvania Supreme Court Justice Bruce W. Kauffman).

⁴⁰⁷ Jason Stein, *State Supreme Court Deadlocks on Gableman’s Ethics Case*, MILWAUKEE J. SENTINEL (July 1, 2010), <http://archive.jsonline.com/news/statepolitics/97557794.html> [https://perma.cc/V5PZ-ACJ7] (quoting former Wisconsin Supreme Court Justice Janine Geske).

B. *Angst When a Former Member Is the Tiebreaker—Maryland*

The seven-member Maryland Court of Appeals (the name for the high court) fills temporary vacancies with retired Court of Appeals judges, though virtually “any former judge” is eligible.⁴⁰⁸ In fact, because the state constitution mandates retirement at age 70 and also permits retired judges to be recalled into service, “the Court may have more provisional, retired members than it has active members.”⁴⁰⁹ Some Maryland lawyers lament the outsized role these retired judges exert, particularly “in some of the Court’s most prominent and controversial decisions.”⁴¹⁰ It’s true. Retired fill-in judges often provide the decisive votes and author the majority opinions in high-stakes cases.⁴¹¹ The replacement judges don’t vote on whether to grant the case, but their vote often decides the outcome. Some appellate specialists contend that retired judges should not wield such influence, particularly in cases of great public importance: “[A]s the Court’s membership shifts with retired judges pinch-hitting for active members, the Court undermines its ability to enunciate a consistent and coherent view of the state’s public policy.”⁴¹² The high court, some lawyers complain, “should be more than just a collection of different panels of disparate decision-makers.”⁴¹³

C. *Angst When the Chief Justice Picks the Tiebreaker—New Jersey and California*

New Jersey has been fighting over temporary New Jersey Supreme Court appointments for years.⁴¹⁴ This political tug-of-war over the makeup of the court has spilled over into how the court handles temporary assignments, though such assignments are never used to break ties.

⁴⁰⁸ MD. CONST. art. IV, § 3A (“[A]ny former judge, except a former judge of the Orphans’ Court, may be assigned by the Chief Judge of the Court of Appeals, upon approval of a majority of the court, to sit temporarily in any court of this State.”).

⁴⁰⁹ Kevin Arthur, *Who Is on the Court of Appeals: The Role of Retired Judges*, MD. APP. BLOG (Mar. 4, 2015), <http://mdappblog.com/2014/01/07/who-is-on-the-court-of-appeals-the-role-of-retired-judges> [<https://perma.cc/P22P-C98B>].

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ The New Jersey Senate President lambasted Governor Chris Christie, alleging he “absolutely, 1,000 percent” broke a longstanding deal to leave unfilled a six-year-old vacancy on the New Jersey Supreme Court. See Brent Johnson, *Sweeney: Christie Absolutely’ Broke Deal on N.J. Supreme Court*, NJ.COM (Jan. 16, 2019) https://www.nj.com/politics/2016/03/sweeney_christie_absolutely_broke_deal_on_nj_supre.html [<https://perma.cc/9GWC-RFZ3>]; see also Brent Johnson, *Sweeney Slaps Down Christie over N.J. Supreme Court Nominee*, NJ.COM (Jan. 16, 2019), https://www.nj.com/politics/2016/03/sweeney_slaps_christie_over_nj_supreme_court_nomin.html [<https://perma.cc/4ZBQ-ZWFG>] (calling the State Senate President’s refusal to grant a confirmation hearing to Governor Christie’s judicial nominee “the newest standoff in an old feud”).

Under the New Jersey Constitution, the Chief Justice “shall assign” temporary replacements for absent justices “[w]hen necessary.”⁴¹⁵ But when is a temporary assignment “necessary”? Necessary to what? Are we talking sort of “necessary” or urgently “necessary”? “Necessary” to reach a quorum or “necessary” to reach the court’s full membership of seven? One scholar contends the state constitution’s substitute justice provision “should be interpreted as a narrow, mandatory duty applicable only when the court would otherwise lack a quorum.”⁴¹⁶ He insists that loosey-goosey appointments to achieve anything that advances the court’s broad judicial power are not “necessary” and “take license with the constitution,” especially with language “designed to cabin its own members’ powers.”⁴¹⁷ Since 1968, however, a court rule has provided that assignments are permissible “to replace a justice who is absent or unable to act, or to expedite the business of the court,”⁴¹⁸ a provision that some observers, including a former member of the court,⁴¹⁹ believe departs from the Constitution’s “[w]hen necessary” restriction, thus “empowering a wily Chief Justice . . . to thereby assign the particular judge she desires.”⁴²⁰ And even if the selection were wholly aboveboard, “there is a considerable risk of suspicion, especially in a ‘politically critical’ case, that it was not,” particularly in cases “where the

⁴¹⁵ N.J. CONST. art. VI, § 2, para. 1 (“The Supreme Court shall consist of a Chief Justice and six Associate Justices. Five members of the court shall constitute a quorum. When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior in service . . . to serve temporarily in the Supreme Court.”)

⁴¹⁶ Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735, 749 (2003). This quorum-focused view is echoed by Professor Maltz, who notes that “by its terms the language of the New Jersey constitution seems consciously designed to limit the discretion of the chief justice” and “[w]hen necessary” should be read as “when necessary to the fulfillment of the court’s constitutional responsibilities.” Earl M. Maltz, *Temporary Assignments to Fill Vacancies on the New Jersey Supreme Court 6* (The Federalist Soc’y, White Paper, Sept. 20, 2010), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/CXnqMXdc7TUCI6wpm6xfdrWDHYDWQyUAHvSPMu gU.pdf> [<https://perma.cc/5FQR-AS6X>].

⁴¹⁷ Hartnett, *supra* note 416, at 761.

⁴¹⁸ N.J. R. 2:13-2(a).

⁴¹⁹ Before leaving the court, former Justice Rivera-Soto wrote a long opinion explaining his decision to abstain in a case in which the chief justice had assigned a temporary justice. Justice Rivera-Soto’s spirited opinion concluded that “[t]he Court as so constituted is unconstitutional and its acts are ultra vires.” He pledged that he “will continue to abstain from all decisions of this Court for so long as it remains unconstitutionally constituted,” though he later tempered his stance, saying he would vote when the temporary justice’s participation didn’t affect the outcome, and perhaps others. *Henry v. New Jersey Dep’t of Human Svcs.*, 9 A.3d 882, 903-14 (N.J. 2010) (Rivera-Soto, J., abstaining).

⁴²⁰ Hartnett, *supra* note 416, at 761.

⁴²⁰ *Id.* at 761 (citing *In re Registrant M.F.*, 776 A.2d 780 (N.J. 2001)) (concerning sex offender registration, in which three justices did not participate, but only one judge was temporarily assigned); see also Michael Booth, *Lawyers Beg for Leniency in Cases of Flubbed Affidavits of Merit*, N.J.L.J., Sept. 29, 2003, at 4 (discussing cases argued the same day and noting that a replacement was named in cases in which Justice Verniero was recused but not in a case in which Justice Wallace was recused).

Supreme Court is otherwise equally divided.”⁴²¹ Ever since the rule was adopted, the court’s assignment practice has been labeled “erratic” and “lawless,” with “little rhyme or reason . . . as to when a temporary replacement will be used for an absent justice.”⁴²² In any event, the clerk says the Chief Justice assigns no one just to break a tie. “We’re not bringing anyone up if we have a quorum. Many high-profile cases have tied 3–3.”⁴²³

The California system grants the Chief Justice near absolute discretion.⁴²⁴ And in years past, it came under particular criticism—namely, that the process “has been manipulated to favor replacements that will vote with the Chief Justice.”⁴²⁵ The knock is that a willful Chief Justice could succumb to the temptation to put a finger on the scale by stacking the court with like-minded allies.⁴²⁶ Some scholars insist the process is prone to manipulation and gamesmanship, finding “substantial evidence of vote bias” in how replacement justices are picked.⁴²⁷ Chief Justice Bird was accused of exactly that—abusing her appointment power to achieve a preferred agenda.

Researchers have tried to move the debate from the anecdotal to the empirical, studying whether Chief Justice Bird was indeed strategically picking judges who would give her a second vote. Three major scholarly investigations examined the agreement rates between Chief Justice Bird and the temporary justices she appointed and compared that data with the agreement rates between Bird’s predecessors and their appointees.⁴²⁸ Although the studies yielded what the most recent analysis called “mixed results,”⁴²⁹ popular distrust of Bird’s neutrality spurred her successors to take a more mechanical, nondiscretionary approach: by picking pro tempore justices alphabetically.⁴³⁰

⁴²¹ Hartnett, *supra* note 416, at 761.

⁴²² *Id.* at 738, 752.

⁴²³ Telephone and E-mail Correspondence with Gail Haney, Clerk, *supra* note 148.

⁴²⁴ See *supra* notes 268–277 and accompanying text (discussing the powers of the chief justice).

⁴²⁵ Schubert, *supra* note 78, at 226. See also Brent, *supra* note 270, at 16–17.

⁴²⁶ Brent, *supra* note 270, at 16–17.

⁴²⁷ Barnett & Rubinfeld, *supra* note 268, at 1155.

⁴²⁸ Comment, *The Selection of Interim Justices in California: An Empirical Study*, 32 STANFORD L. REV. 433, 435 (1980) (examining cases decided between June 1, 1954 and May 31, 1979, calculating an average agreement rate of eighty-seven percent, and concluding “the power to fill temporary vacancies may indeed have been used to assign judges likely to agree with the chief justice”); Stephanie M. Wildman & Denise Whitehead, *A Study of Justice Pro Tempore Assignments in the California Supreme Court*, 20 UNIV. S.F. L. REV. 1, 7 (1985) (“The charge that the Chief Justice assigns pro tem justices in order to influence the judicial process lacks any evidentiary support.”); Barnett & Rubinfeld, *supra* note 268 (examining the tenures of several Chief Justices and discussing commentary surrounding the role of the chief judge).

⁴²⁹ Brent, *supra* note 270, at 15.

⁴³⁰ *Id.* at 18.

The most expansive study, in 1986, looked at voting behavior during years 1954–1984 (spanning four Chief Justices: Gibson, Traynor, Wright, and Bird) and found that overall, assigned justices were more than twenty percent more likely to side with the Chief Justice in cases where the replacement justice’s vote was decisive.⁴³¹ Looking at the Bird court specifically, the authors discerned manipulation in her assignments, noting that (1) temporary justices were more likely to vote with her than were other justices, and (2) this tendency vanished after she instituted a procedural change in April 1981.⁴³²

The agreement percentage spiked during Chief Justice Bird’s tenure, who was accused of wielding the appointment power to manipulate outcomes. Initially, she would assign justices for an entire calendar (up to eighteen cases), not for a single case, and the replacements were forty nine percent more apt to agree with her in cases where they cast the deciding vote.⁴³³ After April 1981, when she limited assignments to a single day, the bias vanished.⁴³⁴

The most recent study, in 2006, is the only one that looks at voting behavior since the post-Bird Chief Justices made the selection procedure less discretionary. This study picked up where the 1986 study left off and examined years 1977–2003, comparing agreement rates between fill-in justices and Chief Justices Bird, Malcolm Lucas, and Ronald George. If Bird was indeed gaming the system, then the shift to alphabetical selection would presumably result in lower levels of agreement.

Bird’s successors opted for nondiscretionary methods of filling temporary vacancies. Chief Justice Malcolm Lucas (1987–1996), adopted a random, alphabetical rotation system.⁴³⁵ Chief Justice Ronald George (1996–2011) kept the rotational system, and also stopped designating trial-court judges, instead choosing only to name appeals court presiding judges.⁴³⁶ The agreement rate between the Chief Justices and their appointees plummeted, suggesting that randomly selected replacements defer less to the Chief Justice.⁴³⁷

Obviously, court decisions that involve a temporary justice carry the same force of law as decisions cast by all-permanent justices. And in California, fill-in justices often cast tiebreaking votes, sometimes in the most contentious, high-stakes cases.⁴³⁸ Their votes pack no less of a punch, but it’s interesting that in California, a temporary replacement is unlikely to author an opinion—

⁴³¹ Barnett & Rubinfeld, *supra* note 268, at 1142.

⁴³² Barnett & Rubinfeld, *supra* note 268, at 1141.

⁴³³ *Id.* at 1142.

⁴³⁴ *Id.*

⁴³⁵ Brent, *supra* note 270, at 18.

⁴³⁶ *Id.*

⁴³⁷ *Id.* at 17.

⁴³⁸ See, e.g., *People v. Belous*, 458 P.2d 194 (Cal. 1969) (considering the constitutionality of a law criminalizing abortion); *DeRonde v. Regents of the Univ. of Cal.*, 625 P.2d 220 (Cal. 1981) (deciding the constitutionality of affirmative action in public universities).

whether majority, concurring, or dissenting. One study looked at 1954–1984 and found that fill-in justices wrote majority opinions in only four percent of cases, compared to thirteen percent for permanent justices.⁴³⁹ As for concurring or dissenting opinions, replacements were only half as likely to write them, in eight percent of cases compared to sixteen percent for permanent justices.⁴⁴⁰

D. *Angst When the Governor Picks the Tiebreaker (and Knows Which Case is Tied)—Texas*

As noted above, the Lone Star State has a bifurcated high-court system: a Supreme Court for civil matters and a Court of Criminal Appeals for criminal matters. But while Texas's dual high courts are constitutional twins, their statutory tiebreaking mechanisms, and the courts' use of them, differ markedly.⁴⁴¹

⁴³⁹ Barnett & Rubinfeld, *supra* note 268, at 1164.

⁴⁴⁰ *Id.*

⁴⁴¹ TEX. GOV'T CODE ANN. § 22.005 (2020). Until 1995, the two courts operated under generally comparable statutes, which empowered the Governor to designate non-judge lawyers. In fact, Governor Clements's lone Supreme Court substitute was a lawyer. Coincidentally, that same year (1988) was the last time the sister high court, the Court of Criminal Appeals, used a substitute judge. The Texas Legislature amended the SCOTX provision a few years later to limit appointments to sitting lower-court judges constitutionally qualified to sit on the court.

Both high courts, however, operate under the same constitutional provision governing disqualifications:

No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Appeals, or any member of any of those courts shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes.

TEX. CONST. art. V, § 11.

The SCOTX and CCA provisions differ in three main ways:

	Texas Supreme Court ⁴⁴²	Texas Court of Criminal Appeals ⁴⁴³
<i>Type of vacancies covered</i>	Recusals and disqualifications.	Only disqualifications.
<i>Discretion to request a substitute</i>	Chief Justice may certify to the Governor.	Presiding Judge shall certify to the Governor. ⁴⁴⁴
<i>Appointee qualifications</i>	Lower-court judge who is qualified to sit on SCOTX.	Someone “learned in the law.”

There is another stark difference: frequency of use. Since 1988, SCOTX has enlisted twenty-four specially commissioned justices, while the Court of Criminal Appeals has used just one.⁴⁴⁵

Yet for all the differences in the two courts’ appointment provisions, the courts share one consequential custom: revealing to the Governor the name of the case in which a tie needs to be broken. This requirement is absent from the Texas Constitution—even while the Texas Constitution itself authorizes the Governor to appoint temporary high court jurists.⁴⁴⁶ Disclosure is just how the court has always done it. Habit. Custom. Inertia.

⁴⁴² § 22.005(a) (“The chief justice may certify to the governor when one or more justices of the supreme court have recused themselves under the Texas Rules of Appellate Procedure or are disqualified under the constitution and laws of this state to hear and determine a case in the court.”); *Id.* § 22.005(b) (“The governor immediately shall commission the requisite number of persons who are active appellate or district court justices or judges and who possess the qualifications prescribed for justices of the supreme court to try and determine the case.”).

⁴⁴³ *Id.* § 22.105(a) (“The fact that a judge of the court of criminal appeals is disqualified under the constitution and laws of this state to hear and determine a case shall be certified to the governor.”); *Id.* § 22.105(b) (“The governor immediately shall commission a person who is learned in the law to act in the place of the disqualified judge.”).

⁴⁴⁴ While the statute requiring notice to the governor is worded in mandatory terms, and not limited to tie-vote situations, the Court of Criminal Appeals has long interpreted it to mean the court need not seek a substitute justice unless the court is “evenly divided on the proper disposition.” *See, e.g.*, Letter from John F. Onion, Presiding Judge, Tex. Ct. of Crim. App., to William P. Clements, Governor, Tex. (Jan. 8, 1988) (on file with Texas A&M University).

⁴⁴⁵ The letter from Presiding Judge Onion to Governor Clements’s office is pretty funny, noting that he had requested the tiebreaking appointment eighteen months earlier, from a previous governor—to no avail. The letter also underscored that the Court of Criminal Appeals has “no appropriations to cover the pay of a special judge,” adding, “I tell you this in order that you might make it clear to whomever is appointed that pay may be a problem.” Letter from John F. Onion, Presiding Judge, Tex. Ct. of Crim. App., to James Huffines, Dir. of Appointments (Jan. 8, 1988) (on file with the Supreme Court of Texas). The letter cites the example of retired SCOTX Justice Meade Griffin, who was once appointed a special Court of Criminal Appeals judge and “had to get special legislation introduced in order to pay him for his services.” *Id.*

⁴⁴⁶ One could hardly fault any governor for adeptly flexing the power constitutionally given him on behalf of the State’s interests as he sees them—and some might well brand it political malpractice not to select tiebreaking justices strategically, too.

The result is that the Governor has lopsided power over the judicial branch. After all, the case might well be one concerning the scope of executive power, or one challenging the Governor's policy initiatives, or one where the Governor has expressed an opinion or even filed an amicus brief urging the court to rule a certain way.

Nobody has publicly lambasted the Lone Star State's odd practice—certainly not the Governors who do the appointing—but the separation-of-powers tension seems both obvious and ominous: inviting a co-equal branch of government to seize outsized influence over a core judicial function.

And the exercise of such a singular power—essentially the power to decide a specific case—seems discordant under the lengthy Texas Constitution, which is so verbose precisely because the Lone Star State's Founders were so persnickety about concentrated power.⁴⁴⁷ Indeed, the Texas Constitution “takes Madison a step further by including, unlike the federal Constitution, an explicit Separation of Powers provision to curb overreaching and to spur rival branches to guard their prerogatives.”⁴⁴⁸

What do elite Texas appellate lawyers think about a system in which the Governor is told not only that a case is deadlocked, but which case is deadlocked? I interviewed several board-certified Texas appellate lawyers who handled cases involving these substitution issues.⁴⁴⁹

One case, *In re EPIC Holdings*,⁴⁵⁰ featured the Governor's post-argument appointment of two justices. The losing party moved for reargument “based on Governor George Bush's recent decision to appoint two new justices to hear and decide this case.”⁴⁵¹ Counsel noted that “the newly appointed justices have not had the benefit of oral argument” and cited a case earlier that year where the court indeed held a second oral argument after the Governor commissioned a tiebreaking justice.⁴⁵²

447 ANTHONY CHAMPAGNE & EDWARD J. HARPAM, GOVERNING TEXAS 91 (Ann Shin ed., 1st ed., 2013) (“The framers of the Texas Constitution gave the state government specific powers so that the government could not use ambiguity to expand its powers. As a result, the Texas Constitution requires frequent amendments to address situations not covered specifically in the original constitution.”).

448 *In re Bd. for Educator Certification*, 452 S.W.3d 802, 808 n.39 (Tex. 2014) (citing TEX. CONST. art. II, § 1).

449 According to the Texas Board of Legal Specialization: “Board Certification is a mark of excellence and a distinguishing accomplishment within the Texas legal community. . . . Board Certified lawyers . . . hav[e] substantial experience, the respect of their peers, and proven specialized competence in their select area of law.” *Why Choose a Board Certified Lawyer?*, TEX. BD. OF LEGAL SPECIALIZATION, <https://www.tbls.org/findlawyer> [<https://perma.cc/B2DS-P56M>] (last visited Dec. 30, 2020).

450 985 S.W.2d 41 (Tex. 1998).

451 Motion for Reargument at 1, *In re Epic Holdings*, 985 S.W.2d 41 (Nos. 96-1131 & 96-1133) (on file with the Texas Supreme Court).

452 *Id.* at 2 (citing *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 29 (Tex. 1998)).

One lawyer who lost a Governor-picks-the-tiebreaker case put it bluntly: “It was a travesty of justice in so many respects.”⁴⁵³ A former Assistant Solicitor General of Texas involved in another deadlocked case describes the current practice as “so wrong on so many levels. It gives me lots of angst.”⁴⁵⁴ When informed that the Governor will be naming a fill-in justice, this lawyer naturally wonders, “Is it a political case even if I don’t think so?”⁴⁵⁵

Another appellate expert, Wade Crosnoe, who lost a substitute-justice case 5–4, says his chief concern is structural: “the potential problem of executive meddling in the judicial branch,” though he stresses he’s “not suggesting that happened in my case.”⁴⁵⁶ He apprehends the risk that “a governor, if so inclined, could study up on the appeal and appoint a justice in a manner designed to achieve a desired result.”⁴⁵⁷ (For the same reason, Crosnoe does not favor giving unfettered discretion to the Chief Justice, who “might also be motivated to select a substitute inclined to see things the chief’s way.”⁴⁵⁸)

Some extensive critique came from another board-certified appellate specialist, Reagan Simpson,⁴⁵⁹ whose comments merit printing in full:

When I argued *St. Joseph Hospital v. Wolff*, the Court had 9 justices. The decision came two years later. By that time, Greg Abbott had been elected Attorney General, and his appointed successor on the Court was my partner Xavier Rodriguez, who had been at our firm when we tried the case and during the appeal. So Justice Moseley was appointed to fill his place. I do not recall being told that Justice Moseley had been appointed for that reason to our case.

The opinion came out on Election Day. I remember getting the surprise call while in a Miami airport. As you know, Xavier [Rodriguez] had not been elected to the Court, so he was off the Court as soon as the election results were certified. The certification of the election then would put Steve Smith on the Court, and Jim Moseley would disappear. I think that explains the nature of the fractured opinions, with concurrences in the result only. The sole holding in *Wolff* by a majority was that, if you correctly object to the charge, you are entitled to an evidentiary review based on what the charge should have been.

⁴⁵³ E-mail from Pamela Baron, Solo Tex. App. Att’y (Feb. 18, 2016) (on file with author).

⁴⁵⁴ E-mail correspondence with a former Assistant Solicitor General of Texas (Mar. 2, 2016) (on file with author).

⁴⁵⁵ *Id.*

⁴⁵⁶ E-mail Correspondence with Wade Crosnoe, Partner, Thompson Coe Cousins & Irons, LLP (Mar. 3, 2016) (on file with author).

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ Mr. Simpson represented the Petitioner in *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513 (Tex. 2002). *See id.* at 517 (naming Mr. Simpson as counsel for the petitioner).

I really never want to argue to a Supreme Court with only 8 justices. That raises the problem of a tie, of course. I do not like a system where the tie is broken by an appointment made for the reason of breaking the tie in that specific case. That raises the problem of a result-based appointment.

Changes in judges is not new to me, of course. In courts of appeals, from time to time, I face changes in the panel. . . . Obviously, I also benefit or suffer from reassignments for [docket] equalization purposes.

But I have never gotten the idea that an appointment was being made specific to a case to affect the result. I would certainly not want that, either for or against me.

So I would prefer to argue always with a full court. If the full court cannot decide the case, I would prefer an appointment before a tie comes up. I would prefer some sort of blind appointment.

I had not thought of this before, but Texas really has an easy way to deal with this. We have two courts elected by the people statewide to make the ultimate decision on important cases. Some justices on both courts have served in the courts of appeals, so they have decided both civil and criminal cases. But a judge is a judge, so civil judging experience is not necessary in my view. Thus, a random appointment from the Court of Criminal Appeals to the Supreme Court would be an idea. Another option would be a random appointment, perhaps based on seniority, from the courts of appeals. I would prefer it to be done by the Chief Justice, not the Governor; it is a matter of court administration.⁴⁶⁰

Opposing counsel's motion for rehearing in *Wolff* stated plainly her dissatisfaction. Counsel was irked that the court's opinion was written by a temporary justice named one year after oral argument, joined by another justice who also had not participated in argument.⁴⁶¹ Most upsetting: "No notice was given to the parties that this appointment had taken place."⁴⁶²

⁴⁶⁰ E-mail Correspondence with Reagan W. Simpson, Partner, Yetter Coleman LLP (Feb. 20, 2016) (on file with author).

⁴⁶¹ *Id.*

⁴⁶² *Id.* From the motion for rehearing:

The makeup of the Court has changed considerably since oral argument in this case. Of the four justices that made up the plurality, only two participated in oral argument. The justice who wrote the plurality opinion, Justice Moseley, was appointed by Governor Perry on October 19, 2001, more than a year after oral argument was heard. November 5, 2002—the day the opinion issued—was the last possible day that Justice Moseley could participate in the decision, because Justice Rodriguez, who had lost to Justice Smith in the primary election, resigned from the Court the following day.

Resp.'s Mot. for Reh'g at 2-3, *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513 (No. 99-1192) (on file with the Texas Supreme Court).

David Keltner, one of the state's top appellate lawyers and a former court of appeals justice, described his experience with the Texas tiebreaker system this way:

It was always strange to me that we went to another branch of government to pick the tiebreaking justice. My initial reaction was “Oh, my goodness. What’s gonna happen?” Also, I probably need to figure out what this judge has done on similar cases. And why in heaven’s name is the governor doing it? It might be better to appoint someone up front. That seems more fair, though it’s not the most efficient use of judicial resources.⁴⁶³

Keltner concedes that “the Governor properly made the appointments according to the process that was in place” but firmly believes “the process could stand a significant revision.”⁴⁶⁴ As Keltner put it:

When *Hyundai* reached the Supreme Court, the petition was granted and the case was argued for the first time. After resignations decimated the Court, the Governor appointed two justices from intermediate courts of appeals and we reargued the case. Ironically, one of the appointed justices wrote the majority opinion.

* * *

The appointment of justices by the Governor seems strange. At the outset, it seems odd for appointments of replacement justices to be made by one who is not part of the judiciary. If the appointment of additional justices were to occur in a case in which the State is a party or in which a sensitive political issue is involved, certainly the appointments would be suspect. Fortunately, in *Hyundai*, neither of those problems was involved and the appointment of two well-qualified justices—one from Mike’s hometown of Houston and the other from my hometown of Fort Worth—made sense.⁴⁶⁵

⁴⁶³ E-mail Correspondence with David Keltner, Partner, Kelly Hart & Hallman LLP (Feb. 29, 2016) (discussing *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743 (Tex. 2006)) (on file with author).

⁴⁶⁴ *Id.*

⁴⁶⁵ Keltner also noted an interesting tie-vote frustration at the court of appeals level:

Ironically, I have had problems with tie votes before. In a case before the Fort Worth Court of Appeals, the panel decision was against me on a 2 to 1 vote, with one justice “aging-out” after the opinion was issued. That justice was not the author but had been in the majority.

On our motion for rehearing *en banc*, I pulled three of the remaining justices, for what appeared to be a 4 to 3 win. However, under the rules, the “aged-out” justice was allowed to remain as the eighth justice on the seven-justice court and the rehearing vote was 4 to 4. Because of the tie vote, rehearing was denied.

On further motion for rehearing, I raised the propriety of allowing a justice, whose term had expired, to sit as the eighth justice on a statutorily created seven-member court. Rehearing and petition for review were denied.

Another appellate specialist said, “The procedure is so unusual,” adding, “If I’m lead counsel, I’ll try to do some digging. ‘What makes this substitute judge tick?’” Overall, though, this lawyer was

inclined to let it be [and not file supplemental briefing focused on the fill-in justice] unless I found something really significant. I’d be reluctant to get in there and stir the pot. It’s not like the Court is hermetically sealed. The justices all talk to each other. I’d likely just let the process unfold.⁴⁶⁶

Another point bears mentioning: Texas’s current Governor, Greg Abbott—possibly owing to his prior service as a justice on the Texas Supreme Court and as Attorney General—has created an *amicus curiae* practice run out of his general counsel’s office. Since January 2015, Governor Abbott’s office has submitted twelve court briefs, including four in the Texas Supreme Court, three in the United States Supreme Court, five in various other state and federal courts, plus five briefs to the attorney general’s office.⁴⁶⁷ Governor Abbott is an experienced, gifted lawyer who well understands the Texas Supreme Court’s unique power to shape state law. As Governor, he has distinct interests, both institutionally and on a policy level, that naturally lead to his effort to steer the law in a discrete direction.

And that unprecedented *amicus* practice raises interesting questions in the realm of tiebreaking votes. As noted above, high court cases sometimes deal with first-principles disputes about the architecture of government. As head of the executive branch, the Governor—particularly this justice-AG-Governor—has sophisticated ideas about how governing power should be allocated. What if a case posed a question going to the core of executive power? What if it involved the most high stakes of state disputes, like school finance? What if the deadlocked case has attracted an *amicus* brief from someone who now wields the power to select the tiebreaking justice—an advocate picking “the decider”?

As you can imagine, my clients felt they had won their case but were denied a victory by the vagaries of nonsensical rules.

Id.

⁴⁶⁶ Telephone Interview with anonymous Texas lawyer (Oct. 2015-Mar. 2016) (on file with author). Despite these concerns, the lawyer noted that “historically, the system doesn’t seem to be causing a lot of mischief—it hasn’t caused terrible harm—but it’s certainly not the way you’d do it if designing from scratch.”

⁴⁶⁷ Telephone and E-mail Correspondence with Jimmy Blacklock, Justice, Tex. Sup. Ct. (Oct. 2015-Mar. 2016) (on file with author); Telephone Correspondence with James Sullivan, Deputy Gen. Counsel, Off. of Tex. Governor Greg Abbott (Nov. 19, 2020).

IV. PROPOSALS FOR REFORM IN TEXAS (AND BEYOND?)

I confess up front: I haven't cracked the code on the perfect method for selecting substitute justices. As with judicial selection generally, there's no glitch-free method, just varying degrees of imperfection. Whether picking temporary judges for one case or permanent judges for all cases, every approach has distinctive pros and cons. But the Governor-picks-the-decider method used in Texas and a handful of other states is fundamentally worrisome.

I favor for Texas an approach that honors both structural principles and prudential goals: separation of powers, judicial independence, neutrality, and judicial economy. My modest proposal: before each Term, have the court name five potential appointees who would be appointed in random order whenever deadlock arises. My fundamental concern—judicial independence—is neither new nor novel. Harken back to Sir Edward Coke.

A. *Classic Coke: Judicial Independence and the Rule of Law*⁴⁶⁸

In the turbulent Elizabethan Age, Sir Edward Coke's consequential life "uniquely contributed to the foundation of the law as an institution independent of the political powers of the state."⁴⁶⁹ Indeed, as one leading Coke scholar avers, "no one has contributed more to create the modern notion of the rule of law" than Coke.⁴⁷⁰

Coke, who served Elizabeth I as Attorney General and James I as Chief Justice, steadfastly resisted the King's dabbling in judicial matters—and was later removed for it.⁴⁷¹ Coke inhabited an age when the feudal order was waning and commercialism was waxing. Conflicts galore arose that needed solutions imposed by a predictable and no-favorites system of legal rules and remedies.⁴⁷²

Coke the jurist, "incorruptible and respected," believed that Parliament and the common law were law's sole legitimate sources and that only courts of law, not other arbiters, not even kings, should decide disputes.⁴⁷³ He believed judges must be allegiant to the dictates of law, not the royal

⁴⁶⁸ The discerning reader will note that "Coke" in this instance is pronounced not like the beverage but instead like "cook." See generally Liberty Fund Books, *Steve Sheppard and the Writings of Sir Edward Coke*, YOUTUBE, at 0:23 (May 18, 2015), <https://www.youtube.com/watch?v=NCSjjxdWIEM> (discussing the significance of Sir Edward Coke in English history and his profound influence on the development of the common law).

⁴⁶⁹ 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE xiii (Steve Sheppard ed. 2003) [hereinafter COKE SELECTIONS].

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at xxiii; accord Gareth H. Jones, *Sir Edward Coke*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Edward-Coke>.

⁴⁷² COKE SELECTIONS, *supra* note 469, at xxiii-xxiv.

⁴⁷³ *Id.* at back cover.

prerogatives of monarchs.⁴⁷⁴ The crown was often unamused at Coke's impertinence, preferring unchecked control over peoples' affairs.⁴⁷⁵

I share Coke's view that a judge should do as a "judge ought to do" free of royal command.⁴⁷⁶ The outcome of the law should not be dictated by imperial power. Coke contributed mightily to the modern notion of the rule of law, which, in our enlightened system of three rival branches, requires separation of powers, not integration. Coke's influence in resisting abuses of power, including the Crown's power (both James and Charles), continued in his post-judicial life as a member of Parliament, when he secured the Petition of Right,⁴⁷⁷ an anthem of liberty for the English people that a century and a half later took deep American root in our own Bill of Rights.⁴⁷⁸

Coke's bold advocacy for judicial independence, a death-defying stand in those days, also manifests in American law through the power of judicial review—most famously articulated by Chief Justice Marshall in *Marbury v. Madison*,⁴⁷⁹ but exercised twenty-one years earlier by Marshall's former law teacher George Wyeth, a venerated state court judge, in *Commonwealth v. Caton*.⁴⁸⁰ The jurisprudential genealogy is evident: Marshall was doubtless influenced by Wythe (who also taught future presidents Jefferson and Monroe), and Wythe was doubtless influenced by Coke.

Governors are not Stuart monarchs. Judicial decision-making must be independent and free of assertions of raw executive power. It is one thing for a Governor to appoint judges who will decide the whole of a court's docket. It is quite another for a Governor to handpick the tiebreaking jurist in discrete cases.

Shortly before Watergate, Senator Sam Ervin reminded America that "an independent judiciary is perhaps the most essential characteristic of a free society."⁴⁸¹ This aversion to executive oppression is anchored deeply in American tradition but was advanced long before the Revolution. As discussed above, our English forebears pushed back against executive oppression. Our Founders continued the fight, listing among the Declaration's grievances George III's habit of making judges "dependent on his [w]ill alone."⁴⁸² The Federalist Papers underscore the bases for Article III's

⁴⁷⁴ *Id.* at xxv-xxvi.

⁴⁷⁵ *Id.* at xxiii, xxvi.

⁴⁷⁶ *Id.* at xxvi.

⁴⁷⁷ *Id.* at xxiii. The Petition of Right was the first of three constitutional documents of English civil liberties, along with the Magna Carta and the Bill of Rights 1689.

⁴⁷⁸ COKE SELECTIONS, *supra* note 469, at xxiii.

⁴⁷⁹ 5 U.S. 137 (1803).

⁴⁸⁰ 8 Va. (4 Call) 5 (1782); accord William Michael Treatnor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994).

⁴⁸¹ Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 L. & CONTEMP. PROBS. 108, 121 (1970).

⁴⁸² THE DECLARATION OF INDEPENDENCE, para. 11 (U.S. 1776).

independent judicial branch, to serve as an excellent barrier both “to the despotism of the prince,” and “to the encroachments and the oppressions of the representative body.”⁴⁸³

In my view, a Governor’s post-deadlock appointment of a tiebreaking justice, after getting the chance to examine the case and form an opinion about how it should be decided, puts the court at risk of undue politicization. The judicial branch letting the executive branch decide a case by proxy? This arrangement resembles a modern-day prerogative court, something akin to a divine-rights theory of kingship/governorship.⁴⁸⁴ What if the deadlocked case involves gubernatorial power or the validity of the Governor’s actions or policies?⁴⁸⁵

I believe high courts should have a tiebreaking mechanism and, for separation-of-powers purposes, it should rest within the judiciary.

B. Possible Paths for Texas

Texas could implement myriad reforms that would enhance judicial independence. The ideal solution—nixing the Governor’s outsized role and housing the tiebreaking system entirely within the judiciary—would require a constitutional amendment, meaning that the legislature, and then the voters, must approve it. Doable, but a non-minor undertaking. That said, the most mischievous feature of the Texas approach—divulging to the Governor which case is tied—can be cured immediately and unilaterally. Nothing in Texas law requires such disclosure. I will briefly address each option.

⁴⁸³ THE FEDERALIST NO. 78 (Alexander Hamilton).

⁴⁸⁴ This is a matter of constitutional dimension, as the Alabama Supreme Court held in 2006. *City of Bessemer v. McClain*, 957 So.2d 1061, 1092 (Ala. 2006). The court confronted the judicial-executive tension head-on in a dispute over who constitutionally has the power to appoint substitute high court justices. Throughout much of Alabama history, the Governor appointed special justices, but in 1973, Alabama amended its Constitution to establish the Chief Justice as the administrative head of the State’s judicial system, and to give the Chief—and only the Chief—the power to “assign appellate justices and judges to any appellate court for temporary service.” ALA. CONST. art. VI, § 110. But Alabama had a preexisting statutory scheme that vested sole power in the governor to appoint a tiebreaking justice if there was “equal division.” ALA. CODE § 12-2-14 (1975). There was a direct conflict between the code and the constitution, and the constitution wins such battles—always. *City of Bessemer*, 957 So.2d at 1092 (“When the Constitution and a statute are in conflict, the Constitution controls . . .”) (quoting *Parker v. Anderson*, 519 So.2d 442, 446 (Ala. 1987)). There is no way, the court said, to square a constitutional provision that confers appointment powers on the chief justice with a statutory provision that constrains such power. The court thus held the statute “invalid to the extent that it improperly restricts the Chief Justice’s constitutionally granted power to assign Special Justices to serve temporarily on this Court.” *Id.* at 1095. Says the clerk’s office: “The Chief Justice is the captain of the judicial boat in all respects.” Telephone and E-mail Correspondence with Brad Medaris, *supra* note 340.

⁴⁸⁵ As the U.S. Supreme Court emphasized in *Caperton v. A.T. Massey Coal*, “fears of bias can arise when . . . a man chooses the judge in his own cause.” 556 U.S. 868, 886 (2009).

1. Baby Steps: Tweak the Governor's Role

Even if Texas retains its Governor-centered method and remains a tiebreaking state and not a tie-avoiding state, one reform seems obvious: The Texas Supreme Court should stop sharing internal vote information outside the judiciary. This is the most harrowing feature of the Texas approach. And it can be remedied instantly.

One rationale given for identifying the name of the case is to ensure the Governor does not unwittingly name someone who might have participated in the case below. But there are several ways to eliminate this concern short of disclosing the case:

- Request the Governor not to appoint someone who hails from a certain court of appeals;
- Tell the Governor nothing, and just alert the Governor if the appointee has a conflict;
- When deadlock arises, ask the Governor for a list of replacement justices in preference order and simply pick the first person eligible to sit;
- At the beginning of a Term, ask the Governor to submit three names in preference order that the court will use as needed.

2. Swing for the Fences: Scrap the Governor's Role

Fortune favors the bold, and I favor a top-to-bottom overhaul that severs the Gordian knot clean through, keeping the process entirely within the judicial branch.⁴⁸⁶

After examining all fifty states, here is my modest proposal for that judicial process: Before each term, the Texas Supreme Court should collectively agree on five potential appointees who would be selected—in random order—should deadlock arise. If the first name drawn has a conflict, another name would be chosen until someone is able and willing to sit. Keeping appointee selection wholly within the judicial branch honors separation of powers and judicial independence, underscoring the Supreme Court's institutional role as administrative head of the judicial branch.⁴⁸⁷ And having five consensus names on the front end, plus the randomness of the specific name chosen, promotes evenhandedness and ensures that one justice cannot wield outsized influence by picking strategically. This method also

⁴⁸⁶ It is true the Texas Constitution, not merely a statute, confers this pro tem appointment power on the governor. *See* TEX. CONST. art. V, § 11. So for Texas, adopting my proposal would take a constitutional amendment—meaning the Legislature, and then ultimately the voters, must approve any proposed reform.

⁴⁸⁷ *See* TEX. GOV'T CODE ANN. § 74.021 (2019) (“The supreme court has supervisory and administrative control over the judicial branch and is responsible for the orderly and efficient administration of justice.”).

advances judicial economy, as it applies only when the court is deadlocked. Finally, to give it a distinctive Lone Star flavor (and inspired by Louisiana’s Jack-o’-Lantern), names would be drawn from a ten-gallon Stetson:



Figure 9: Lone Star Stetson Hat⁴⁸⁸

Enhancing the role of the Texas Supreme Court in selecting judicial replacements aligns with how most states approach avoiding or breaking ties. And Texas law seems copacetic with this judiciary-led approach. As it currently stands, the Chief Justice has judge-picking power in various special situations:

- *Public school finance challenges*—The Chief Justice, after being petitioned by the attorney general, appoints a “special three-judge district court” to hear challenges to “the finances or operations of this state’s public school system.”⁴⁸⁹ One member is specified by statute (“the district judge of the judicial district to which the original case was assigned”⁴⁹⁰), but the chief has discretion in picking the other two.⁴⁹¹
- *Redistricting*—As described immediately above, the Chief Justice names a special three-judge trial court that “involves the apportionment of districts” for various state and federal offices.⁴⁹²

⁴⁸⁸ Don Willett, *How the States Avoid Supreme Stalemates*, JUDICATURE, Winter 2016, at 8, <https://law.duke.edu/sites/default/files/centers/judicialstudies/judicature/judicature-100.4-willett.pdf>.

⁴⁸⁹ See *id.* § 22A.001(a)(1).

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.* § 22A.002(a)(2)-(3).

⁴⁹² *Id.* § 22A.001(a)(2) (outlining that the other two judges in the three-judge trial court will consist of a district court judge from a different judicial district than the one the case was assigned and a judge from a court of appeals).

- *Judicial disciplinary proceedings*—The Chief Justice appoints a three-member special court of review, a panel of court of appeals justices selected by lot.⁴⁹³ Says the Supreme Court’s general counsel, “This is not discretionary. We literally put all Justices’ names in a hat and pick three out.”⁴⁹⁴ Separately, when the Judicial Conduct Commission recommends removal or retirement of a judge, the Chief Justice selects by lot a seven-member Review Tribunal of court of appeals justices.⁴⁹⁵ Each of Texas’s fourteen courts of appeals designates one of its members for inclusion in the pool, and the first name drawn chairs the Review Tribunal.⁴⁹⁶

- *Attorney disciplinary proceedings*—Judges in attorney discipline matters are appointed by the court as a whole.⁴⁹⁷ Says the Supreme Court general counsel: “We rotate those assignments among active district judges around the state, it’s pretty much random, but we do take into account whether they’ve been on the bench at least a year, how long it’s been since their last assignment, and we select from a different administrative judicial region than the attorney to reduce conflicts. I send these recommendations to all Justices for review before the assignments are made.”⁴⁹⁸

- *Certain other recusal-based vacancies*—The Chief Justice has authority to assign judges in certain other cases where recusals occur—e.g., the regional presiding judge, who would normally oversee recusal motions, has recused himself, meaning the Chief Justice must appoint the trial judge instead.⁴⁹⁹

On timing, Texas could model most states and strive to avert ties by filling out the court as soon as it drops below full strength. “It might be better to appoint someone up front,” according to one appellate specialist, although that approach is “certainly not the most efficient use of judicial resources.”⁵⁰⁰ Yet “up front” need not mean before a case is argued; it could also mean you have a bullpen of potential appointees from which to draw if, and only if, the short-staffed court locks up 4–4.

⁴⁹³ *Id.* § 33.001(11); *see generally* TEX. R. DISCIPLINARY P. 3.02 (discussing the assignment of judges to preside in disciplinary cases).

⁴⁹⁴ Interview with Nina Hess Hsu, Gen. Counsel, Tex. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). The former Chief Justice, a proud graduate of the Michigan State University College of Law, reportedly used a Spartan cap. The current hat is a nondescript wool chapeau.

⁴⁹⁵ GOV’T § 33.001(9).

⁴⁹⁶ TEX. CONST. art. V, § 1-a(9); *see also* Interview with Nina Hess Hsu, *supra* note 494.

⁴⁹⁷ TEX. R. DISCIPLINARY P. 3.02.

⁴⁹⁸ Interview with Nina Hess Hsu, *supra* note 494.

⁴⁹⁹ GOV’T §§ 74.049–.057.

⁵⁰⁰ E-mail Correspondence with David Keltner, *supra* note 463.

CONCLUSION

When you seek fortune-telling advice from a Magic 8 Ball, the icosahedron may well respond, “Ask again later” or “Better not tell you now” or “Concentrate and ask again.” Out of twenty possible answers, ten are positive, five are negative, and five are neutral.⁵⁰¹ Yet courts ought never tell litigants, “Reply hazy—try again.” It’s one thing for a supreme court to be Delphic, providing gauzy pronouncements that leave people scratching their heads. It’s another for a supreme court to be mute, providing no pronouncement at all and leaving people shaking their fists. There’s a reason Lady Justice is depicted with scales and not with a shrug.

Courts of last resort must be courts, and courts exist to decide cases. Every state high court in America has an odd-numbered composition for good reason: to avoid ties. But supreme courts inevitably confront temporary vacancies—some long (unfilled vacancy, extended illness) and some short (case-specific recusal)—that raise the risk of deadlock.

Federal law forbids a tiebreaking mechanism at the U.S. Supreme Court.⁵⁰² There is no such thing as a substitute SCOTUS Justice. The fifty states, however, handle the specter of stalemate in wildly different ways.

In some states, fill-in justices are selected neutrally; in other states, intentionally. And in Texas, the appointer—the head of a separate branch of government—wields an extraordinary power: He knows not only that a case is tied, but which case, arguably enabling him to decide the case by deciding who decides it.

But it was a nineteenth-century Texas Governor—Sul Ross—who cautioned, “[L]oss of public confidence in the judiciary is the greatest curse that can ever befall a nation.”⁵⁰³ The judiciary’s power derives from a public perception that courts operate above the political fray, that the judiciary (even an elected one, as most state judiciaries are) is not merely another political branch of government. Judicial legitimacy necessarily means that judges are not perceived as politicians in robes, stacking the legal deck to impose ideologically congenial results. And judicial independence should not require dependence on another branch to break ties in known cases.

I have not devised a glitch-free mechanism for impasse resolution. Every approach—pre-deadlock vs. post-deadlock, chief justice individually vs. court

⁵⁰¹ See *Magic 8-Ball*, WIKIPEDIA, http://en.wikipedia.org/wiki/Magic_8-Ball [<https://perma.cc/87JQ-V6M3>] (last visited Mar. 2, 2016) (detailing the distribution of answers provided by the Magic 8-Ball).

⁵⁰² Hartnett, *supra* note 18, at 651-52.

⁵⁰³ Andrew Cohen, *An Elected Judge Speaks Out Against Judicial Elections*, ATLANTIC (Sept. 3, 2013), <http://www.theatlantic.com/national/archive/2013/09/an-elected-judge-speaks-out-against-judicial-elections/279263> [<https://perma.cc/UD6Q-Y93A>].

collectively, unfettered discretion vs. randomized—has upsides and downsides. For Texas, I propose letting the court, at the beginning of each Term, designate five lower-court judges to be appointed in random order as deadlock arises. In my view, this approach ensures that cases get decided but in a manner that furthers separation of powers, judicial independence, neutrality, and judicial economy.

The U.S. Supreme Court usually dominates the spotlight. But America “boasts not one Constitution but 51, meaning American constitutionalism concerns far more than what began in Philadelphia 232 years ago.”⁵⁰⁴ Justice Brandeis memorably depicted states as laboratories of democracy.⁵⁰⁵ And when it comes to impasse resolution, state-level innovations abound, some more juris-imprudent than others. My hope is that this Article sparks fruitful scrutiny of state high courts’ tiebreaking systems and helps policymakers identify smart refinements that honor judicial independence and the Rule of Law.

⁵⁰⁴ *Thompson v. Dall. City Att’y’s Off.*, 913 F.3d 464, 471 (5th Cir. 2019); see also SUTTON, *supra* note 22, at 16-21.

⁵⁰⁵ *New State Ice. Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

APPENDICES

Appendix A—Summary Chart of State Approaches

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
Ala.	9	Back-end tiebreaking	Judge	Chief Justice	ALA. CODE § 12-2-14 (1975), <i>held unconstitutional in</i> City of Bessemer v. McClain, 957 So. 2d 1061, 1093-95 (Ala. 2006); Telephone and Email Correspondence with Brad Medaris, Cent. Staff Att’y, Ala. Sup. Ct. (Dec. 2015) (on file with author). <i>See supra</i> notes 340 & 484 and accompanying text.
Alaska	5	Affirm by equally divided court	n/a	n/a	ALASKA R. APP. P. 106; ALASKA CONST. art. IV, § 16; Telephone and Email Correspondence with Marilyn May, Clerk of App. Cts., Ala. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 157-58 and accompanying text.
Ariz.	5	Front-end avoidance	Judge	Chief Justice	Telephone and Email Correspondence with Janet Johnson, Clerk, Ariz. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> note 202 and accompanying text.
Ark.	7	Front-end avoidance; Back-end tiebreaking	Attorney	Governor	ARK. CONST., amend. 80, § 13(A); Telephone and Email Correspondence with Stacey Pectol, Clerk of Cts., Ark. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 204-208 & 341-342 and accompanying text.

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
Cal.	7	Front-end avoidance; Back-end tiebreaking	Judge	Chief Justice	CAL. CONST. art. VI, § 6; CAL. SUP. CT., INTERNAL OPERATING PRACS. & PROCS. §§ IV.J, XIII.B; Telephone and Email Correspondence with Frank McGuire, Ct. Admin & Clerk, Cal. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 273-274 and accompanying text.
Colo.	7	Affirm by equally divided court	n/a	n/a	COLO. APP. R. 35(b); Telephone and Email Correspondence with Polly Brock, Clerk, Colo. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).
Conn.	7	Back-end tiebreaking	Judge	Court	CONN. GEN. STAT. §§ 51-207, 51-209; Conn. R. App. P § 70-6 ; <i>see also Pesino v. Atl. Bank</i> , 709 A.2d 540; Telephone and Email Correspondence with Pamela Meotti, Chief Admin. Officer, Conn. Sup. Ct. (Oct. 2015) (on file with author). <i>See supra</i> note 380 and accompanying text.
Del.	5	Front-end avoidance	Judge	Chief Justice	Email Correspondence with Leo Strine, Chief Just., Del. Sup. Ct. (Oct. 26, 2015) (on file with author). <i>See supra</i> note 211 and accompanying text. Telephone and Email Correspondence with Cathy Howard, Clerk, Del. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).
Fla.	7	Back-end tiebreaking	Judge	Chief Justice	FLA. SUP. CT. INTERNAL OPERATING PROC. § X; Telephone and Email Correspondence with John Tomasino, Clerk, Fla. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
Ga.	7	Front-end avoidance	Judge	Court	GA. CONST. art. VI, § 6, para. 1; GA. CODE ANN. § 15-2-2; Telephone and Email Correspondence with Therese Barnes, Clerk, Ga. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 212 & 382-384 and accompanying text.
Haw.	5	Front-end avoidance	Judge	Chief Justice	Telephone and Email Correspondence with Public Affairs Office, Hawaii State Judiciary (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 282-287 and accompanying text.
Idaho	5	Front-end avoidance	Judge	Court	IDAHO CONST. art. V, § 6; Telephone and Email Correspondence with Stephen Kenyon, Clerk, Idaho Sup. Ct. (Jan. 2016) (on file with author). <i>See supra</i> notes 214, 266-267, 385 and accompanying text.
Ill.	7	Affirm by equally divided court	n/a	n/a	Perlman v. First Nat'l Bank of Chi., 331 N.E.2d 65, 66 (Ill. 1975) (per curiam); ILL. CONST. art. VI, § 16; Telephone and Email Correspondence with Carolyn Taft Grosboll, Clerk, Ill. Sup. Ct. (Oct. 2015) (on file with author).
Ind.	5	Affirm by equally divided court	n/a	n/a	IND. APP. R. 58(c); Telephone and Email Correspondence with Kevin Smith, Clerk, Ind. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
Iowa	7	Affirm by equally divided court	n/a	n/a	IOWA CODE § 602.4107; Polk Co. Bd. of Review v. Village Green Co-Op, Inc., No. 13-1205, 2014 WL 2619674, at *1 (Iowa June 13, 2014); Telephone and Email Correspondence with Donna Humpal, Clerk, Iowa Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> note 43 and accompanying text.
Kan.	7	Affirm by equally divided court	n/a	n/a	KAN. CONST. art. 3, § 4; Thornton v. Shore, 654 P.2d 475 (Kan. 1982); Telephone and Email Correspondence with Heather Smith, Clerk, Kan. Sup. Ct. (Jan. 2016) (on file with author).
Ky.	7	Affirm by equally divided court	n/a	n/a	Ky. Utils. v. S.E. Coal, 836 SW 2d 407, 409-410 (1992); KY. CONST. § 110(5)(b); Telephone and Email Correspondence with Susan Clary, Clerk, Ky. Sup. Ct. (Feb. 24, 2016) (on file with author). <i>See supra</i> notes 154, 178 and accompanying text.
La.	7	Front-end avoidance	Judge	Court	Telephone and Email Correspondence with John Olivier, Clerk, La. Sup. Ct. (Oct. 2015–Jan. 2016) (on file with author). <i>See supra</i> notes 386-390 and accompanying text.
Me.	7	Affirm by equally divided court	n/a	n/a	Day v. State Tax Assessor, 942 A.2d 685, 686 (Me. 2008); Hale v. Antoniou, 820 A.2d 586, 586 (Me. 2003); Telephone and Email Correspondence with Matthew Pollack, Exec. Clerk, Me. Sup. Ct. (Nov. 2015) (on file with author).

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
Md.	7	Front-end avoidance	Judge	Chief Justice	MD. CONST. art. IV, § 3A; Telephone and Email Correspondence with Bessie Decker, Clerk, Md. Ct. App. (Oct. 2015–Feb. 2016) (on file with author).
Mass.	7	Affirm by equally divided court	n/a	n/a	Fresh Pond Shopping Ctr., Inc. v. Rent Control Bd. of Cambridge, 446 N.E.2d 1060, 1060 (Mass. 1983); Pacella v. Milford Radio Corp., 476 N.E.2d 595, 595 (Mass. 1985); MASS. R. APP. P. 27.1(g); Telephone and Email Correspondence with Francis Kenneally, Clerk, Mass. Sup. Ct. (Nov. 2015–Jan. 2016) (on file with author).
Mich.	7	Affirm by equally divided court	n/a	n/a	MICH. COMP. LAWS § 600.230; People v. Sullivan, 609 N.W.2d 193 (Mich. 2000); Telephone and Email Correspondence with Larry Royster, Clerk, Mich. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 176–177, 180–182 and accompanying text.
Minn.	7	Affirm by equally divided court	n/a	n/a	State v. Retzlaff, 842 N.W.2d 565, 565 (Minn. 2012); MINN. CONST. art. VI, § 2; Telephone and Email Correspondence with Rita DeMeules, Clerk, Minn. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 154, 200 and accompanying text.

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
Miss.	9	Affirm by equally divided court	n/a	n/a	MISS. CONST. art. 6, § 165; <i>Hewes v. Langston</i> , 853 So. 2d 1237, 1243 (Miss. 2003); Telephone Interview with Bill Waller Jr., Chief Just., Miss. Sup. Ct. (Jan. 15, 2016) (on file with author); Telephone and Email Correspondence with Hubbard T. Saunders, IV, Clerk, Miss. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).
Mo.	7	Front-end avoidance	Judge	Chief Justice	MO. CONST. art. V, § 6.; Telephone and Email Correspondence with Clerk, Mo. Sup. Ct. (Mar. 2016) (on file with author). <i>See supra</i> notes 198, 216 and accompanying text.
Mont.	7	Front-end avoidance	Judge	Chief Justice	Telephone and Email Correspondence with Ed Smith, Clerk, Mont. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 218–220, 225 and accompanying text.
Neb.	7	Front-end avoidance	Judge	Court	Telephone and Email Correspondence with Teresa Brown, Clerk, Neb. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 226–230, 391 and accompanying text.
Nev.	7	Back-end tiebreaking	Judge	Governor	NEV. CONST. ART. 6, § 4; NEV. REV. STAT. § 1.225(5); NEV. R. APP. P. 25A(b)(2)(C); NEV. SUP. CT. R. 10(8); Telephone and Email Correspondence with Tracie Lindeman, Clerk, Nev. Sup. Ct., (Oct. 2015–Feb. 2016). <i>See supra</i> notes 344–349 and accompanying text.

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
N.H.	5	Back-end tiebreaking	Judge	Chief Justice	N.H. REV. STAT. ANN. § 490:3; Telephone and Email Correspondence with Eileen Fox, Clerk, N.H. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 289-292 and accompanying text.
N.J.	7	Affirm by equally divided court	n/a	n/a	N.J. CONST. art. VI, § 2, para. 1; N.J. R. 2:13-2(a); Telephone and Email Correspondence with Gail Haney, Clerk, N.J. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 148, 423 and accompanying text.
N.M.	5	Front-end avoidance	Judge	Chief Justice	Telephone and Email Correspondence with Joey Moya, Clerk, N.M. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 231-237 and accompanying text.
N.Y.	7	Back-end tiebreaking	Judge	Court	Telephone and Email Correspondence with Andrew Klein, Clerk, N.Y. Ct. App. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> note 392-396 and accompanying text.
N.C.	7	Affirm by equally divided court	n/a	n/a	Forbes Homes, Inc. v. Trimpi, 326 S.E.2d 30, 30 (N.C. 1985); N.C. GEN. STAT. §§ 7A-39.3, 7A-39.5; Telephone and Email Correspondence with Christie Roeder, Clerk, N.C. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> note 44 and accompanying text.
N.D.	5	Front-end avoidance	Judge	Chief Justice	Telephone and Email Correspondence with Penny Miller, Clerk, N.D. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 238-242 and accompanying text.

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
Ohio	7	Front-end avoidance	Judge	Chief Justice	Interview with Maureen O'Connor, Chief Just., Ohio Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author). <i>See supra</i> notes 243-249 and accompanying text. Telephone and Email Correspondence with Amy Reitz, Clerk, Ohio Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).
Okla. (civil)	9	Back-end tiebreaking	Judge	Chief Justice	OKLA. CONST. art. VII, § 6; Order of Appointment, Gandy v. Oklahoma, No. C-2009-720 (Okla. Crim. App. Apr. 20, 2009); Telephone and Email Correspondence with Michael Richie, Clerk, Okla. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author). <i>See supra</i> note 306-307 and accompanying text.
Okla. (crim.)	5	Back-end tiebreaking	Judge	Chief Justice (civil)	Okla. Const. art. VII, § 6; Gandy v. Oklahoma, No. C-2009-720; Telephone and Email Correspondence with Michael Richie, Clerk, Okla. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author). <i>See supra</i> note 306-307 and accompanying text.
Or.	7	Front-end avoidance	Judge	Court	Telephone and Email Correspondence with Lisa Norris-Lampe, Clerk, Ore. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author). <i>See supra</i> notes 250-251, 397-401 and accompanying text.
Pa.	7	Affirm by equally divided court	n/a	n/a	Commonwealth v. Koch, 106 A.3d 705, 705 (Pa. 2014); PA. SUP. CT. INTERNAL OPERATING PROCS. § 4(B)(3); Telephone and Email Correspondence with John Vaskov, Clerk, Pa. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author).

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
R.I.	5	Affirm by equally divided court	n/a	n/a	Meyer v. Meyer, 68 A.3d 571, 587 (R.I. 2013); 8 R.I. GEN. LAWS ANN. § 8-3-8(d) (2020); R.I. R. APP. P., art. I, r. 25(a); Cahill v. Morrow, 11 A.3d 82, 86 (R.I. 2011); Ucci v. Mancini, 387 A.2d 1056, 1057 (R.I. 1978); Telephone and Email Correspondence with Debra Saunders, Clerk, R.I. Sup. Ct. (Dec. 2015) (on file with author). <i>See supra</i> notes 151, 171-173, 179 and accompanying text.
S.C.	5	Front-end avoidance; Back-end tiebreaking	Judge	Chief Justice	S.C. CODE ANN. § 14-1-215; Telephone and Email Correspondence with Dan Shearouse, Clerk, S.C. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 308-310, 312-313 and accompanying text.
S.D.	5	Front-end avoidance	Judge	Chief Justice	S.D. CONST. art. V, § 11; Telephone and Email Correspondence with Laura Graves, Clerk, S.D. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> note 315 and accompanying text.
Tenn.	5	Front-end avoidance; Back-end tiebreaking	“[M]en . . . of law knowledge” (justices); lower-court judge (chief justices)	Chief Justice & Governor	TENN. CONST. art. VI, §§ 3, 11; State <i>ex rel.</i> Hooker v. Thompson, 249 S.W.3d 331, 335 (Tenn. 1996); TENN. CODE ANN. §§ 17-2-102, -104, -110(a); Hooker v. Sundquist, 1999 WL 74545 at *3 (Tenn. Feb. 16, 1999) (unpublished); Telephone and Email Correspondence with James M. Hivner, Clerk, Tenn. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 355-356 and accompanying text.

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
Tex. (civil)	9	Back-end tiebreaking	Judge	Governor	TEX. CONST. art. V, § 11; TEX. GOV'T CODE ANN. § 22.005; Act of May 19, 1995, ch. 428, § 1, 1995 Tex. Gen. Laws 3097, 3097; Telephone and Email Correspondence with Blake Hawthorne, Clerk, Tex. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).
Tex. (crim.)	9	Back-end tiebreaking	“[A] person who is learned in the law”	Governor	TEX. CONST. art. V, § 11; TEX. GOV'T CODE ANN. § 22.105(a); Telephone and Email Correspondence with Abel Acosta, Clerk, Tex. Ct. Crim. App. (Oct. 2015–Feb. 2016) (on file with author); Letter from John F. Onion, Presiding Judge, Tex. Ct. of Crim. App., to William P. Clements, Governor, Tex. (Jan. 8, 1988). <i>See supra</i> notes 444-445.
Utah	5	Front-end avoidance	Judge	Chief Justice	UTAH CONST., art. VIII, § 2; Telephone and Email Correspondence with Andrea Martinez, Clerk, Utah Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 253-254 and accompanying text.
Vt.	5	Front-end avoidance	Judge	Chief Justice	Telephone and Email Correspondence with Deb Laferriere, Program Adm'r, Vt. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 255, 257-261 and accompanying text.
Va.	7	Front-end avoidance	Judge	Chief Justice	VA. CODE ANN. § 17.1-302(B) (2020); Telephone and Email Correspondence with Trish Harrington, Clerk, Va. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 263-264, 316-318 and accompanying text.

State	No. of justices	Tiebreaking method, if any	Who can be a tiebreaker?	Who appoints the tiebreaker?	Primary Authorities
Wash.	9	Front-end avoidance	Judge	Chief Justice	WASH. SUP. CT. ADMIN. R. 21(c); Telephone and Email Correspondence with Ron Carpenter, Clerk, Wash. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> note 301-303 and accompanying text.
W. Va.	5	Back-end tiebreaking	Judge	Chief Justice	Telephone and Email Correspondence with Rory Perry, Clerk, W. Va. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 319-324 and accompanying text.
Wis.	7	Affirm by equally divided court	n/a	n/a	Sohn Mfg. Inc. v. Lab. & Indus. Rev. Comm'n, 854 N.W.2d 371, 371 (Wis. 2014); Telephone and Email Correspondence with Diane Fremgen, Clerk, Wis. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author).
Wyo.	5	Front-end avoidance	Judge	Chief Justice	Telephone and Email Correspondence with Carol Thompson, Clerk, Wyo. Sup. Ct. (Oct. 2015–Feb. 2016) (on file with author). <i>See supra</i> notes 330-335 and accompanying text. Telephone and Email Correspondence with E. James Burke, Chief Justice, Wyo. Sup. Ct. (Oct. 2015-Feb. 2016) (on file with author). <i>See supra</i> notes 335-339 and accompanying text.

Appendix B—Texas’s Temporary-Justice Process

Since the late 1980s, the Texas Supreme Court has used judicial pinch-hitters sparingly—in just fourteen cases: nine during the tenure of Governor Rick Perry (2000–2015);⁵⁰⁶ four during the tenure of Governor George W. Bush (1995–2000);⁵⁰⁷ and one during the tenure of Governor Bill Clements (1979–1983 and 1987–1991).⁵⁰⁸

The relatively small number of Governors and deadlocks facilitates empirical examination of how requests for substitute justices are handled in the Governor’s Office and how those temporary appointees tend to vote. This Appendix examines all fourteen cases and concludes that, even with the small sample, Governors’ Offices have had polar-opposite views on how and whom to pick. As a practical matter, how are requests for substitute justices handled in the Governor’s Office? And how do those temporary appointees tend to vote?

1. Non-strategic Selection—A Generic Focus on “Capable, Qualified Jurists”; “We Didn’t Try to Tip the Scales in a Big Way.”

- a. *Governor Bill Clements (1979–1983 and 1987–1991): One Appointee in One Case*

Bill Clements was the 42nd and 44th Governor of Texas, but he appointed just one substitute Justice, in 1988—a temporary chief justice, in fact.⁵⁰⁹

The Chief Justice at that time, Tom Phillips (whom Governor Clements had appointed a few months earlier), was disqualified from sitting in a personal-injury case being litigated by his former law firm.⁵¹⁰ At that time, Texas law did not require the substitute justice to be a sitting lower-court judge, and Governor Clements appointed a prominent Dallas lawyer, Tom Luce (who two years later ran, unsuccessfully, for Governor himself).⁵¹¹

⁵⁰⁶ See *supra* note 358.

⁵⁰⁷ See *supra* note 359.

⁵⁰⁸ See *supra* note 360.

⁵⁰⁹ Until this 1988 appointment, the most recent appointment was a full quarter-century earlier, in 1963.

⁵¹⁰ *Hous. Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784 (Tex. 1988) (listing Baker Botts representation); cf. Thomas R. Phillips, Baker Botts, <https://www.bakerbotts.com/people/p/phillips-thomas-r> [<https://perma.cc/D8KH-CEHJ>] (last visited Nov. 21, 2020) (noting Phillips’ employment at Baker Botts before and after his time on SCOTX).

⁵¹¹ The Legislature changed the statute after this case to require that temporary Supreme Court justices be lower-court judges constitutionally qualified to sit on the court. Telephone Interview with Tom Phillips, former Chief Justice, Sup. Ct. Tex. (August 21, 2015) (on file with author); see also *supra* notes 369–376.

b. *Governor George W. Bush (1995–2000): Seven Appointees in Four Cases*

Governor Bush appointed seven substitute Justices in four cases.⁵¹² Unfortunately, neither of the two Bush-era appointment directors, Clay Johnson (for the first three cases) and Ron Bellamy (for the final case), recalls how these requests were handled.⁵¹³

Interviews with several of those appointed, however, reveal some details. For example, Judge Stephen Ables recalls receiving a call from Clay Johnson, with whom Judge Ables had some recent contacts.⁵¹⁴ Governor Bush had just appointed him presiding judge of one of Texas's nine administrative judicial regions. Judge Ables was a known and respected judge, also serving on the Texas Judicial Council. He had also invited Johnson to speak at a Philosopher's Club meeting. Judge Ables recalls Johnson saying he "wanted to get a trial judge and appellate judge."⁵¹⁵ He says Johnson described generally what the case was about and asked Judge Ables to confirm he had no conflicts that would preclude his appointment. Johnson mentioned it was a big case out of Dallas, and "everyone in the Dallas GOP was close to one side or the other. He wanted someone far from Dallas to avoid accusations of appointing someone with connections."⁵¹⁶ All in all, says Judge Ables, "it was a very enjoyable experience," though generally, he says, "the Bush/Perry appointments offices never had a great feel for the judiciary."⁵¹⁷

In the Bush era, only one of the appointed justices wound up in the minority, writing the dissent, it turns out. In *In re George*, decided 5–4, the dissent was penned by Scott Brister, then a trial judge but who a few years later would himself be appointed to the Supreme Court. (Brister was also commissioned a substitute justice while later serving on the court of appeals.) Sometimes the replacement justice even authored the opinion for the court.⁵¹⁸

⁵¹² See *supra* note 359.

⁵¹³ Governor Bush's first appointments director, Clay Johnson, later headed the White House Office of Presidential Personnel under President Bush, and then served as Deputy Director of the Office of Management and Budget. Telephone Interview with Ron Bellamy, former Appointments Dir. for Governor Bush (August 23, 2015) (on file with author).

⁵¹⁴ Telephone Interview with Stephen Ables, Judge, Tex. 6th Admin. Jud. Region (Aug. 31, 2015) (on file with author).

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ Justice Jim Moseley, then a member of the Dallas-based court of appeals, authored a plurality opinion in *St. Joseph's Hosp. v. Wolff*, 94 S.W.3d 514 (Tex. 2003). The Texas Supreme Court experienced frenetic turnover in the early 2000s (ten new justices from 2000 to 2005), and was actually decided with eight justices, as the opinion explains:

After the case was argued and while it was under submission, Justice Gonzales and Justice Abbott resigned from the Court. Justice Rodriguez, who was appointed to replace Justice Abbott, recused himself from participation in the decision of the case.

c. *Governor Rick Perry (2000–2015): Sixteen Appointees in Nine Cases*

Rick Perry, the longest-serving Governor in Texas history, also holds the record for most number of substitute justices appointed: sixteen in nine cases (four cases in 2008 alone).⁵¹⁹ Fourteen of the sixteen appointees were court of appeals justices, and two were district court judges.

As during the Bush and Clements governorships, Governor Perry relied exclusively on his appointments director. When it came to naming permanent Supreme Court justices, Governor Perry's appointments director assembled a team of people, including lawyers outside the Governor's Office, to help interview top candidates. But when naming temporary, one-case-only justices, the appointments office handled it solo.

The appointments offices under Governors Clements and Bush were not led by lawyers. That changed during Governor Perry's tenure, when appointments were led by lawyer Ken Anderson (who had also served as deputy appointments director for Governor Clements). And Anderson did not consult with gubernatorial staff outside the appointments office. "I handled judicial appointments myself," Anderson says.⁵²⁰ There was no real interview process and no attempt to plumb a candidate's thoughts on the case, which Anderson says would be "highly improper."⁵²¹

Interviews with Governor Perry's two appointments directors reveal a process focused on administrative nuts and bolts, such as avoiding recusal issues, not on trying to steer the result a certain way. "We tried to figure out where the case was from so we wouldn't appoint judges with a conflict," said Anderson.⁵²² "We tried to move them around geographically, tending to prefer urban areas, where you'd have judges who've heard more sophisticated cases."⁵²³

When the first request arrived from the court for a substitute justice, Anderson had to first go back and refresh his recollection on the statute. Governor Clements's sole substitute appointee, in 1988, had been a lawyer, but the statute was amended in 1995. "I discovered it had been changed to require a sitting judge," Anderson says.⁵²⁴

What criteria did Governor Perry's office use?

Chief Justice Phillips certified that fact to the Governor, who thereupon commissioned to the Court the Honorable James A. "Jim" Moseley, Justice of the Court of Appeals for the Fifth District of Texas at Dallas, to participate in deciding the case.

Id. at 519 n.10.

⁵¹⁹ See *supra* note 358.

⁵²⁰ Telephone Interview with Ken Anderson (Aug. 20, 2015) (on file with author).

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.*

⁵²⁴ *Id.*

We looked for folks who actually would've been good Supreme Court justices—the best and the brightest. We didn't read briefs, but we explored what the case involved big picture. In a utility case, for example, we would look for someone who likes to dig into the weeds because it'll require a lot of homework.⁵²⁵

Anderson says they did not try to influence the case outcome, an “improper” impulse in his view:

We didn't try to tip the scales in a big way. That could come back to bite the Governor in the behind and put potential appointees in a pickle. Philosophical distinctions are not all that huge. It was more what were their backgrounds. I tried to diversify the Court in terms of background experience. They were all conservatives in a legal sense. We just tried to get someone smart and conservative.⁵²⁶

Anderson says he has “no real misgivings” about the Texas procedure, though he concedes there's “no perfect mechanism.”⁵²⁷ In that sense, he says, it's akin to judicial selection, where every system has pros and cons. “Clements and Perry viewed judicial appointments seriously,” says Anderson, adding, “Their only priority was to appoint a smart, conservative judge.”⁵²⁸ Anderson has no recollection of anyone reaching out or suggesting names or lobbying for someone, though he says after Governor Perry began appointing substitute justices, “judges would approach me and volunteer to be appointed.”⁵²⁹

How do Governor Perry's substitute appointees recount the experience? Former Justice Jim Moseley of the Dallas-based court of appeals described his selection for the *Wolff* case this way:

I was talking to Ken [the appointments director] about other issues, and near the end he said, “Occasionally, we have to appoint a temporary justice. Would that be something you'd be interested in?” It was just a question in the abstract. But Ken called months later and asked if I'd be interested in sitting in this case or had any conflicts. They wanted someone not from Austin or Houston, which as I recall is where the parties were from. The Court had already had argument. We met in the conference room, discussed the case, and reached a tentative vote. I got the strong impression the case had been around the horn once or twice.⁵³⁰

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ Telephone Interview with Jim Moseley, former Just., Sup. Ct. Tex. (Sept. 10, 2015) (on file with author).

Justice Moseley isn't a fan of disclosing the case to the Governor. "A better option," he says, "is to just inform the Governor there's a need for an appointment, and then run the choice by the chief justice for conflicts. That way you preserve anonymity and protect separation of powers."⁵³¹

2. Strategic Selection—A Targeted Focus on the Issues Raised and Who Might Lean a Preferred Direction; "The Judicial Version of a Fantasy Football Draft": Governor Greg Abbott (2015–present)

Texas's newest Governor has yet to appoint a substitute justice. But interviews with his key executive personnel make clear that Governor Abbott—a former Texas Supreme Court justice and attorney general—would approach the responsibility much differently, and more strategically, than his non-lawyer predecessors.

Governors Clements, Bush, and Perry relied exclusively on their appointments directors when naming substitute justices. Governor Abbott, by contrast, would be far more engaged personally and would consult a wider circle of executive-team advisers (chief of staff, deputy chief of staff, general counsel), all top-tier lawyers who served in senior staff roles alongside him at the attorney general's office. These savvy and versatile lawyers, including federal appellate and SCOTUS clerks, boast a sophisticated understanding of the judicial branch generally and the court's docket specifically.

When asked how Governor Abbott's team might handle a request for a tiebreaking justice, his appointments director, Luis Saenz, laughed, "It would be the biggest pow-wow," he said, joking, "We're talking fantasy football draft. Eye black. Calisthenics. People banging their heads into lockers."⁵³² Saenz says they would examine the case to assess whose background might "fit the case."⁵³³

Governor Abbott's former general counsel Jimmy Blacklock, who now serves as a Texas Supreme Court justice, confirms that Governor Abbott "would take it really seriously."⁵³⁴ In fact, a lawyer from the general counsel's office is assigned to every judicial vacancy and plays "a big role in the judicial selection process."⁵³⁵ Governor Abbott and his Chief of Staff, a 15-year Abbott veteran and former Number Two in the Attorney General's Office, "would take it as seriously as anybody could."⁵³⁶

⁵³¹ *Id.*

⁵³² Telephone Interview with Luis Saenz, Appointments Dir., Off. of Tex. Governor Greg Abbott (Aug. 24, 2015) (on file with author).

⁵³³ *Id.*

⁵³⁴ Telephone and E-mail Correspondence with Jimmy Blacklock, *supra* note 467.

⁵³⁵ *Id.*

⁵³⁶ *Id.*

Now Justice Blacklock explained that the Governor's Office would "want to know everything we possibly could about the case and the record," which would help them select the right jurist to assist the court in making an expeditious, principled decision.⁵³⁷ Certainly "we'd ask what are the Governor's interests in the outcome and in the direction the case might take the law. These cases have broad implications."⁵³⁸ As with any gubernatorial decision, including permanent vacancies to be filled, the Governor's "view of the case would matter."⁵³⁹ Ultimately, this role was not one any Governor demanded, but one given to all Governors by the People. "The Texas Constitution is written to vest power in the governor to select a tiebreaker. Our Framers were comfortable with him exercising this power."⁵⁴⁰

Texans elect their judges, but vacancies are filled by the Governor. And since taking office, Governor Abbott's team has overhauled the judicial nominee application in order to get a better read on applicants' judicial philosophies. The then general counsel (who later succeeded this author on the Supreme Court of Texas) describes it as "60-70% the same as Perry, but it now has seven to eight pointed questions about judicial philosophy."⁵⁴¹ Indeed, Governor Abbott's hands-on approach to judicial nominations long predates his election as Governor. While serving on the Texas Supreme Court, then Justice Abbott volunteered to help vet lower-court judicial nominees from the Houston area for Governor Perry.

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*